Supreme Court of the United States

October Term, 1920
No. 546.

MAX W. STOEHR, suing in his own behalf as a stockholder of Stoehr & Sons, Inc., and on behalf of all others similarly situated,

Appellant,

against

JAMES N. WALLACE et al, FRANCIS P. GARVAN Alien Property Custodian, and others,

Appellees,

Appeal from the District Court of the United States for the Southern District of New York.

APPELLANT'S POINTS.

LOUIS MARSHALL,
LOUIS J. VORHAUS,
Of Counsel.

B. H. Tyrrel, Printer, 206-8 Fulton Street, New York.

SUBJECT INDEX.

CASES AND AUTHORITIES CITED.

TEXT BOOKS, TREATIES AND ACTS.

Supreme Court of the United States

OCTOBER TERM, 1920.

No. 546.

MAX W. STOEHR, suing in his own behalf as a stockholder of Stoehr & Sons, Inc., and on behalf of all others similarly situated,

Appellant,

against

JAMES N. WALLACE, *et al.*, FRANCIS P. GARVAN, Alien Property Custodian, and others.

Appeal from the District Court of the United States for the Southern District of New York.

APPELLANT'S POINTS.

The plaintiff has brought this action as a stockholder of the defendant Stoehr & Sons, Inc., a New York corporation, in his representative capacity, to restrain the Alien Property Custodian from selling 20,590 shares of the capital stock of the Botany Worsted Mills owned by Stoehr & Sons, Inc., and that he be adjudged to release and surrender the shares of stock owned by said Stoehr & Sons, Inc., so seized and taken

by him and to account for his acts in and about his attempted possession and control of such shares of stock (*Rec., pp. 1-20*).

The material facts are practically admitted. Stoehr & Sons, Inc., hereinafter referred to as the New York Company, was incorporated on February 17, 1917, with a capital stock of $250,000, consisting of 2,500 shares of the par value of $100 each. The directors of this corporation were Hans E. Stoehr, Max W. Stoehr, Alfred de Liagre and George H. Röhlig. They were all residents of the State of New York and, with the exception of Hans E. Stoehr, were citizens of the United States (*Rec., pp. 184, 185*). Max W. Stoehr came to this country on October 15, 1900, and was naturalized on May 25, 1911. Hans E. Stoehr, his brother, took up his residence here in 1902. He applied for citizenship but before he could secure his final citizenship papers he had removed from New Jersey to New York, and because of the lapse of more than five years after he had obtained his first papers it became necessary for him to take proceedings *de novo*, which he did in 1913 or the beginning of 1914. Both brothers were married and lived here with their families.

Prior to the formation of the New York Company, Hans E. Stoehr and Max W. Stoehr, together with their father, Eduard Stoehr, and a brother, George Stoehr, constituted a partnership under the name of Stoehr & Sons. Eduard and George Stoehr lived in Germany (*Rec., p. 100*).

On February 19, 1917, the partnership of Stoehr & Sons offered to sell to the New York Company its business, property, good-will and other assets in consideration of $250,000 of the capital stock of the company, full paid and non-assessable, and the assumption by the corporation of all of the

liabilities of Stoehr & Sons. This offer was accepted and the liabilities were assumed (*Rec., p. 188*). In conformity with this agreement the New York Company acquired the property of Stoehr & Sons and issued all of its capital stock, amounting to $250,000, to the members of the partnership of Stoehr & Sons (*Rec., pp. 187, 188*), in the proportion of their respective interests in the partnership (*Rec., p. 102*), and concurrently with this distribution, under a voting trust agreement dated February 19, 1917, wherein Hans E. Stoehr, Max W. Stoehr and George G. Röehlig were designated as voting trustees (*Rec. pp. 197-199*), voting trust certificates were issued for the benefit of Eduard Stoehr and George Stoehr to Max W. Stoehr as trustee, and to Hans E. Stoehr and Max W. Stoehr, covering their interests in the stock issued to them respectively for their interests in the partnership property of Stoehr & Sons (*Rec., pp. 102, 103*).

The Botany Worsted Mills was a corporation organized in 1889 under the laws of New Jersey, with a capital stock of $3,600,000, consisting of 36,000 shares of the par value of $100 each. From the time of its incorporation it had been engaged in the business of manufacturing worsted and woolen cloths and yarns (*Rec., pp. 3, 105*). The partnership of Stoehr & Sons was a stockholder of record of the Botany Worsted Mills prior to February 20, 1917, to the extent of 5,690 shares (*Rec., p. 101*). A German company called "Kammgarn-Spinnerei Stoehr & Co., Aktiengesellschaft," hereinafter called the Leipzig Company, was on February 20, 1917, beneficially interested in 14,900 shares of the capital stock of the Botany Worsted Mills. 10,000 of these shares were transferred on the books of the company in the name of Hans

E. Stoehr, as trustee, on January 15, 1915, and 4,900 of these shares were transferred on the books of the company in the name of Max W. Stoehr, as trustee, on February 25, 1915 (*Rec., p. 106*).

On February 20, 1917, the Leipzig Company entered into a contract with the New York Company whereby it sold, assigned and transferred to the latter all of its interest in these 14,900 shares, and concurrently with the execution of this agreement Hans E. Stoehr and Max W. Stoehr, as trustees, caused the shares to be transferred on the books of the Botany Worsted Mills to the New York Company (*Rec., pp. 14-16*). The terms of this contract are fully set forth in the opinion rendered on the decision of this case (*Rec., pp. 306-308*) and are hereafter discussed under Point I.

The property and plant of the Botany Worsted Mills were of great value. The corporation was organized on May 11, 1899, at the time of the outbreak of the war in 1917 employing approximately 7,000 men. Its plant was extensive, covering nearly 140 acres of land. It operated over 2,100 looms with nearly 100,000 spindles. The volume of its business in 1917 reached $28,000,000, and is conceded to have been profitable (*Rec., pp. 105, 106; Plaintiff's Exhibit 10, facing Rec., p. 204*). *Plaintiff's Exhibits 11 and 12* (*Rec., pp. 206 to 210*) show the financial statement for the years ending November 30, 1917 and November 30, 1918 respectively. At the time of the transfer of these shares the Botany Worsted Mills was under the direction and control of Hans E. Stoehr and Max W. Stoehr. George Röhling, who was a nephew of Eduard Stoehr, and Alfred de Liagre, who was also a relative of the family, were likewise directors of the Botany Worsted Mills, (*Rec., pp. 120, 219*).

On April 5, 1918, A. Mitchell Palmer, Alien Property Custodian, notified the Botany Worsted Mills of the seizure by him of the 14,900 shares of its stock standing on its books in the name of the New York Company (*Rec., pp. 204, 205*), and from time to time further action was taken by Mr. Palmer and by his successor, Francis P. Garvan, as Alien Property Custodians, respecting the seizure of these shares, of the interest of Eduard and George Stoehr in the shares of the New York Company, and of the amount payable by the New York Company to the Leipzig Company for the purchase price of the 14,900 shares of the stock of the Botany Worsted Mills pursuant to the provisions of the contract of February 26, 1917 (*Defendants' Exhibits C1, D1, E1, G1, I1, J1, K1, L1, Rec., pp. 250-271*).

Hans E. Stoehr died on March 18, 1918 (*Rec., p. 100*). Herbert Heyn, Esq., of Heyn & Covington, who for some years had been the counsel of Stoehr & Sons and of the Botany Worsted Mills and under whose supervision the New York Company was organized and the contract between it and the Leipzig Company was executed, died on April 30, 1918 (*Rec., p. 112*). George Röehlig died in October, 1918 (*Rec., p. 120*).

Immediately after the seizure of the shares in Stoehr & Sons, Inc., owned by Eduard and George Stoehr and of the 14,900 shares of the Botany Worsted Mills owned by the New York Company, Mr. Palmer, as the Alien Property Custodian, called for the resignation of the then directors of the two companies, and chose as directors of the New York Company James N. Wallace, Francis P. Garvan, Andrew B. Duvall and Paul Kiefer. Messrs. Garvan and Duvall were connected with

the office of the Alien Property Custodian. Mr. Kiefer was associated with John Quinn, who was designated as the attorney of the New York Company and likewise of the Botany Worsted Mills (*Rec., pp. 113, 114*). At the instance of Mr. Palmer, James N. Wallace, Andrew B. Duvall, Walter D. Jones, Thomas F. Martin, Thomas J. Maloney and H. C. MacEldowney were designated as directors of the Botany Worsted Mills (*Rec., p. 115*). The circumstances under which these designations were made is explained at *Rec., pp. 113-116.*

Although the business of the Botany Worsted Mills continued to be profitable and neither its property nor that of the New York Company was perishable or of such a character as to require immediate sale for its preservation, subsequent to November 11, 1918, the date of the Armistice, the Alien Property Custodian took proceedings for the sale, among other shares of the Botany Worsted Mills seized by him, of the 14,900 shares belonging to the New York Company. The shares of the Botany Worsted Mills had never been listed on any stock exchange and had never been traded in in the open market. The stock had no quotable market value. The same is true of the stock of the New York Company (*Rec., p. 117*). The only American competitors of the Botany Worsted Mills were Forstman & Huffman, of Passaic, and the American Woolen Company. There were, however, important corporations in England and France who were engaged in the same business (*Rec., p. 117*).

Without giving to the New York Company any notice that the Alien Property Custodian intended to sell these shares of stock, without legal

proceedings directing or authorizing such sale (*Rec., pp. 118, 119*), the Alien Property Custodian gave public notice that he would offer these shares for sale to the highest bidder at the front door of the main office of the Botany Worsted Mills, at Passaic, New Jersey, on December 2, 1918. The terms and conditions of the sale included the following:

> "1. Said 25,700 shares of stock will be offered for sale in one parcel and as an entirety, and the bids therefor will be made per share."
>
> "3. No bid will be received unless the person offering to bid shall have deposited with the Alien Property Custodian or with Joseph F. Guffey, Director, Bureau of Sales, * * * as a pledge that he will make good his bid in case of its acceptance, a check for the sum of $100,000, certified by some bank or trust company and payable to the order of said Director * * *.
>
> "4. Such property will be sold only to an American citizen or citizens, or to a corporation incorporated within and under the authority of the laws of a state or territory of the United States or any of its insular possessions; but the Alien Property Custodian shall have the right to exclude from bidding at any such sale and/or from purchasing or otherwise acquiring the above described property, any corporation which he shall, after investigation, determine to be controlled, managed or operated, wholly or mainly, by or for the account or benefit of a person or persons not a citizen or citizens of the United States or of its insular possessions. The Alien Property Custodian or said Director of Bureau of Sales shall have the right to require, either before or after any bidding or acceptance of any bid, evidence that the bidder is qualified, as above

provided, to bid for and purchase said property."

"11. Further information concerning the property to be sold and concerning said Botany Worsted Mills may be had by application to said Joseph F. Guffey, Director of Sales, Alien Property Custodian * * *. No inspection of the plant will be allowed except upon written order from said Director of Sales, to be given only to those (a) who have qualified as bidders, or (b) who shall have deposited with said Director of Sales a certified check for $25,000, said deposit to be returned upon the qualification of said person as a bidder, in the event such person shall so qualify; otherwise as soon as practicable after the sale."

"14. Said sale shall be made by the Alien Property Custodian by virtue of and subject to the provisions of the Act of Congress known as the 'Trading with the Enemy Act,' as amended, and the proclamations and executive orders issued in pursuance thereof, and particularly the executive order issued by the President of the United States on the 16th day of July, 1918, copies of which may be obtained by application to Joseph F. Guffey, Director of Sales, Alien Property Custodian * * *"

(*Plaintiff's Exhibit 10, facing Rec., p. 204*).

This exhibit also indicates the extent and character of the property of the Botany Worsted Mills.

The appellant protested against the proposed sale (*Rec., pp. 17, 18*). He also filed a claim pursuant to Section 9 of the Trading with the Enemy Act (*Rec., pp. 22-25*), and set forth that fact in a supplemental bill (*Rec. pp. 21, 22*). As a result of the filing of this claim the sale was stayed until final judgment herein.

Other material facts are set forth under the proper headings in the Points that follow.

The case was tried before the Honorable Learned Hand in the District Court of the United States for the Southern District of New York, who, on June 11, 1920, rendered judgment dismissing the original and supplemental bills of complaint herein upon the merits (*Rec., p. 319*). An appeal was allowed to this Court from the decision so rendered (*Rec., pp. 320, 321*), the appellant having assigned the errors set forth in the *Record at pages 321-324*), as follows:

Assignment of Errors.

I. The Court erred in holding that the Act of Congress known as "Trading with the Enemy Act," approved October 6th, 1917, and the amendments thereto approved March 28, 1918, and November 12, 1918, in so far as the same undertook to permit the seizure of the property of Stoehr & Sons, Inc., a New York corporation, ex parte and without affording to it a hearing or an opportunity to be heard and to confer upon the Alien Property Custodian the right to sell the property so seized without proceedings before a judicial tribunal, was constitutional.

II. The Court erred in refusing to hold that in so far as the Alien Property Custodian undertook ex parte and without a legal proceeding based upon notice and a hearing or an opportunity to be heard in court, to take possession of the shares of stock of the Botany Worsted Mills belonging to Stoehr & Sons, Inc., and to determine that such shares belonged to Kammgarnspinnerei Stoehr &

Co. Aktiengesellschaft, or to any other enemy, his action was null and void and in violation of the due process clause of the Constitution of the United States.

III. The Court erred in refusing to hold that any title that may have accrued to Stoehr & Sons, Inc., under the terms of the contract of February 20, 1917, was not divested by the passage of the "Trading with the Enemy Act," and in refusing to hold that in so far as said Act undertook to divest such title it constituted a deprivation of property without due process of law within the meaning of the due process clause of the Constitution of the United States.

IV. The Court erred in refusing to hold that the sale attempted by the Alien Property Custodian of the shares of stock of the Botany Worsted Mills claimed by Stoehr & Sons, Inc., a New York corporation, in the absence of a judgment in a proceeding duly instituted and conducted in accordance with due process, constituted a violation of the right of property of Stoehr & Sons, Inc., within the meaning of the due process clause of the Constitution of the United States.

V. The Court erred in holding that Stoehr & Sons, Inc., acquired no title to the 14,900 shares of stock of the Botany Worsted Mills described in the contract of February 20, 1917.

VI. The Court erred in holding that the shares of stock of the Botany Worsted Mills described in the contract of February 20, 1917, were not put

beyond the reach of capture by the execution of such contract.

VII. The Court erred in holding that the contract of February 20, 1917, did not constitute an executed sale but a mere option to purchase the 14,900 shares of stock of the Botany Worsted Mills which were the subject-matter of said contract.

VIII. The Court erred in holding that the contract of February 20, 1917, did not convey to Stoehr & Sons, Inc., the title to the 14,900 shares of stock of the Botany Worsted Mills therein described.

IX. The Court erred in not holding that by the terms of the agreement of February 20, 1917, Stoehr & Sons, Inc., acquired at least the equitable title to the 14,900 shares of the capital stock of the Botany Worsted Mills which are the subject-matter of that instrument.

X. The Court erred in not holding that the transfer of the title to the 14,900 shares of the capital stock of the Botany Worsted Mills to Stoehr & Sons, Inc., was accomplished on February 20, 1917, and that subsequent events did not invalidate such transfer.

XI. The Court erred in not holding that the equitable title to the 14,900 shares of the Botany Worsted Mills having passed to Stoehr & Sons, Inc., on February 20, 1917, the fact that the consideration was to be paid later and that the shares of stock pledged as collateral security were to be

redelivered from time to time as the instalments of the purchase price were paid, did not affect the title or render the contract executory or subject to dissolution upon the declaration of war.

XII. The Court erred in not holding that Stoehr & Sons, Inc., the owner of the 14,900 shares of stock of the Botany Worsted Mills, an American corporation, was not an enemy or ally of an enemy within the meaning of the "Trading with the Enemy Act," and that they were not therefore subject to capture or seizure under its terms, and that the act of the Alien Property Custodian in condemning them as enemy-owned property upon his determination that they were such was without jurisdiction and void.

XIII. The Court erred in not holding that the proposed sale by the Alien Property Custodian of the 14,900 shares of stock of the Botany Worsted Mills would constitute a violation of the true intent and meaning of the "Trading with the Enemy Act."

XIV. The Court erred in dismissing the bill of complaint for want of equity and in entering the final decree to that effect against the complainant.

XV. The Decree of the District Court in favor of the defendants is contrary to the law and the evidence in the case.

POINTS.

I.

By the terms of the agreement of February 20, 1917, Stoehr & Sons, Inc., the New York Company, acquired at least the equitable title to the 14,900 shares of the capital stock of the Botany Worsted Mills, prior to that date belonging to Kammgarnspinnerei Stoehr & Co., Aktiengesellschaft, the Leipzig Company, which are the subject-matter of that instrument.

These shares, at the time of the execution of this instrument, though beneficially owned by the Leipzig Company, stood in the names of Hans E. Stoehr and Max W. Stoehr, as trustees, upon the books of the Botany Worsted Mills, 10,000 shares in the name of Hans from February 15, 1915, and 4,900 shares in the name of Max from February 26, 1915. This is alleged as a fact in the answer of the Alien Property Custodian *(Rec. pp. 30, 32)*. These shares were on February 20, 1917, transferred on the books of the Botany Worsted Mills from the names of the trustees into the name of Stoehr & Sons, Inc., concurrently with the execution of the contract of that date *(Rec. p. 36)*. The stock certificates were, however, at the time in Germany, it being then impossible, owing to the practical blockade maintained by the Allies, to arrange for their transmission from Germany to the United States.

The appellees have contended and the Court below has decided that no rights were acquired by Stoehr & Sons, Inc., to these shares on the theory that the instrument of February 20, 1917, was a

mere executory contract or an option, and that under its terms no obligation whatsoever was incurred by Stoehr & Sons, Inc.

(1) A careful examination of this contract will demonstrate the error of these contentions and that it accomplished an actual sale involving mutual obligations.

It is termed an "Agreement" *(Rec. p. 14)*. It describes the beneficial interest of the Leipzig Company. It recites that "the Leipzig Company is desirous of selling and said New York Company is desirous of purchasing said interest on the terms and conditions hereinafter set forth" *(Rec. p. 14)*.

It recites the payment by Stoehr & Sons, Inc., to the Leipzig Company of $5,000 on account of the purchase price of these shares of stock. The proof shows that a credit was given (*Rec. pp. 138, 172*) to the Leipzig Company for that amount. That was in legal effect payment of the amount so credited.

It is then set forth that in consideration of such payment and in further consideration "of the *mutual promises* of the parties as herein set forth, it is hereby agreed as follows:"

This element of mutuality, coupled with the use of the word *"agreed,"* is important as indicating that the transaction was not unilateral, but bilateral, and that it involved not only agreements and covenants on the part of the Leipzig Company, but on the part of Stoehr & Sons, Inc., as well.

This proposition requires no elaboration. It is established by a wealth of authority.

Wells v. *N. Y. Central R. Co., 24 N. Y. 181, 183.*

Baldwin v. *Humphrey, 44 N. Y. 609.*
Payne v. *New South Wales Coal & Intercolonial Steam Nav. Co., 10 Hurl. & G. 283, 291.*
Barton v. *McLean, 5 Hill, 256, 258.*
Greene v. *Creighton, 7 R. I. 8.*
Thornton v. *Kelly, 11 R. I. 498, 499.*
Rohr v. *Baker, 13 Oregon 350 (citing Plowd. 5).*
Jones v. *Williams, 139 Mo. 1, 77 L. R. A. 682.*
Arnold v. *Scharbauer, 116 Fed. Rep. 492, 497.*
Leonard v. *Marshall, 82 Fed. Rep. 396, 399.*
Richardson v. *Clements, 89 Pa. 503, 505.*
Bingham v. *Insurance Co., of N. A., 74 Wis. 498.*
Moran v. *Standard Oil Co., 211 N. Y. 187, 197.*

In the case last cited Judge Cardozo said (the italics being those of the Court):

> "The very word 'agreement' connotes a mutual obligation. *(Benedict* v. *Pincus, 191 N. Y. 377, 383, 384.)* There may be a 'promise' to serve without a promise to employ, but there can be no 'agreement' for service without mutuality of rights and duties. *(Richards* v. *Edick, 17 Barb. 260, 263; Baldwin* v. *Humphrey, 44 N. Y. 609, 615.)* 'If it be *agreed* between A and B that B shall pay a sum of money for his lands, etc., on a particular day, those words amount to a covenant by A to convey the lands, for agreed, is the word of both.' (*Pordage* v. *Cole, 1 Saund. 3191,* quoted in *Baldwin* v. *Humphrey,* (*supra.*) So, in *Richards* v. *Edick* (*supra*), where the cove-

> nant read: 'The aforesaid party of the first part *agrees* to sell his farm in Florence, etc., to the party of the second part for and in consideration of seventeen hundred dollars,' the court held that the word 'agreement' necessarily imported two parties, one to sell and one to buy. 'It was not merely a *promise* made by one party to the other, but it was an *agreement* made by *both* and binding on *both* by every principle of law and morality applicable to the construction of contracts.' (*Richards* v. *Edick, supra.*)"

The First paragraph of the "agreement" thus made speaks in the present tense, *per verba de praesenti.* It does not refer to any future sale, assignment and transfer of these shares of stock or to an option to the New York Company to purchase them at any future time. On the contrary it proclaims in unequivocal vocal words a present sale (*Rec., p. 14*):

> "The Leipzig Company *hereby sells, assigns and transfers* unto the New York Company all of its interest in said shares *and said shares of stock shall be forthwith transferred upon the books of the Botany Worsted Mills and placed in the name of the said New York Company.*"

This constitutes a present sale, assignment and transfer. It is not an agreement to sell or an option to buy, but an actual executed sale. Before the New York Company entered into the contract its Board of Directors passed a resolution authorizing the purchase of the Leipzig Company in these shares (*Rec., p. 35*). Immediately after the contract was entered into the shares were as has been shown transferred on the books of the Botany Worsted Mills into the name of the New York Company (*Rec., p. 36*). Irrespective as to

whether or not these acts vested in the New York Company the legal title, it certainly conferred upon it the equitable title and ownership of these shares, assuming that the transaction was lawful at the time when it was made, as we shall presently show it to have been.

The Second paragraph provides (*Rec., p. 14*):

> "The terms of the *sale* and the *purchase price* for said shares shall be determined as follows and paid in the following instalments."

Thereupon follow four subdivisions (*a*) (*b*) (*c*) and (*d*) which define the manner in which the *purchase price* is to be determined and how and when it shall be paid. The price is to be *payable* in five instalments, the first being *payable* in one year from the date of the contract and the subsequent instalments respectively in two, three, four and five years from said date; provision being in the meantime made for the apportionment of the dividends received by the New York Company on these shares until the terms of the contract are entirely carried out.

Nowhere in the instrument are to be found words creative of an option or indicative of a purpose to confer on the New York Company the right to elect whether it would take the shares or not.

(2) Before considering other features of this instrument, we shall direct our attention to the claim of the defendants that Stoehr & Sons, Inc., did not bind themselves to purchase or to pay for these shares and incurred no obligation whatsoever. That this contention is without merit, appears from the fact that the Second paragraph speaks not only of a "sale," but of "the purchase

price" of the shares, and that such purchase price "shall be * * * paid in the following instalments." This is followed by the clauses stating when the installments of the purchase price are "payable."

The use of the word "payable" implies an obligation to pay.

Black's Law Dictionary, p. 180.
22 Am. & Eng. Enc. Law, 2d ed., p. 510.

If this language coupled with the repeated use of the word "agreed" does not create an obligation to pay the amount of such purchase price ascertained in the manner specified, these words would be without meaning. That full effect to all that is expressed and implied in them must be given is required by the most elementary of the canons of interpretation.

This is especially true in view of the fact that the instrument is called an "agreement" that it declares, in its introductory clause, that "it is hereby agreed," and that the execution of the instrument was immediately followed by action on the part of Stoehr & Sons, Inc., to perfect the sale and the transfer of the shares as agreed upon, by causing a transfer of them to be made to it upon the books of the Botany Worsted Mills.

Here, again, the authorities are clear that the agreement created an obligation on the part of the New York Company to pay the purchase price of the shares in the manner specified.

In *Booth* v. *Cleveland Rolling Mill Co., 74 N. Y. 15,* Judge Allen, in language which has become classic, said:

> "There is no particular formula of words, or technical phraseology, necessary to the

creation of an express obligation to do, or forbear to do, a particular thing or perform a specified act. If, from the text of an agreement, and the language of the parties either in the body of the instrument or in the recital or references, there is manifested a clear intention that the parties shall do certain acts, courts will infer a covenant in the case of a sealed instrument, or a promise if the instrument is unsealed, for non-performance of which an action of covenant or assumpsit will lie. * * * The agreement which is the foundation of this action was drawn without as much regard to form as to substance, and the parties were content to give expression to their general intent, without studying accuracy or fitness of expression in detail, or setting forth the positive obligations with technical precision. The agreement as reduced to writing is not unilateral, but mutual in its character and obligations. * * * It was in terms declared to be a memorandum of the agreement between the plaintiffs of the one part, and the defendants of the other, and each became parties to it, and bound by its terms by their signatures. The memorandum of the agreement is slightly informal in this, that by it the parties have not in technical language assumed the obligations and promised in *totidem verbis* to perform the stipulations of the agreement as recited and set forth in the paper writing, but the parties have in stating their respective obligations, and the stipulations to be performed by each, employed language fully the equivalent of an express promise, and quite as expressive of an absolute and personal obligation to perform the stipulations, and clearly manifesting not only an intent to promise, but an actual promise."

In the present case the instrument is not only described as "an agreement" between the parties,

but it recites that the Leipzig Company is desirous of selling and the New York Company is desirous of purchasing the beneficial interest of the Leipzig Company in the shares of stock of the Botany Worsted Mills then standing in the names of Hans E. Stoehr and Max W. Stoehr. Coupled with the terms of the First and Second paragraphs of the instrument which we have quoted, it is impossible to escape the conclusion that there was an obligation on the part of Stoehr & Sons, Inc., to purchase and to pay for the shares correlative with the actual sale, assignment and transfer by the Leipzig Company of the shares upon the terms set forth in the agreement.

The case just cited has been followed frequently, among others in

Jones v. *Kent*, 80 N. Y. 588.

New England Iron Co. v. *Gilbert Elevated Ry. Co.*, 91 N. Y. 165.

Patterson v. *Guardian Trust Co.*, 144 App. Div. 866.

Commercial Wood Co. v. *Northampton Portland Cement Co.*, 115 App. Div. 393.

Horton v. *Hall Mfg. Co.*, 94 App. Div. 407.

Matter of White Plains Water Commrs., 71 App. Div. 550.

Creamer v. *Metropolitan Securities Co.*, 120 App. Div. 422.

Genet v. *D. & H. Canal Co.*, 136 N. Y. 593.

See also

Butler v. *Thompson*, 92 U. S. 412.

In the recent case of *Grossman* v. *Schenker*, *206 N. Y. 466*, it was held that a mutual agreement implies an offer and acceptance or a promise in some form, and where it has been mutually agreed that the defendant would pay to the plaintiff a sum named for "superintendence" of certain work, that there was not only an express promise by the defendant to pay, but also an implied promise by the plaintiff to superintend. The words of Judge Vann are important:

> "A contract includes not only what the parties said but also what is necessarily to be implied from what they said. (*Milliken* v. *Western Union Tel. Co.*, 110 N. Y. 403, 408.) Thus the words 'cash on delivery' with no other promise to pay 'imply a promise and create an obligation' to make payment upon delivery. (*Justice* v. *Lang*, 42 N. Y. 493.) So the word 'sold' in a written agreement implies not only a contract to sell but also a contract to buy (*Butler* v. *Thomson*, 92 U. S. 412, 414); and a contract to buy with no express promise to sell implies the latter obligation. (*Hudson Canal Co.* v. *Penn. Coal Co.*, 8 Wall. 276, 289.) 'What is implied in an express contract is as much a part of it as what is expressed' (*Bishop on Contracts, 2d ed.*, §241); for 'the law is a silent factor in every contract' (*Long* v. *Straus*, 107 Ind. 94, 95)."

So in *Simon* v. *Etgen*, *213 N. Y. 589*, defendant's testator agreed to pay plaintiff's assignor whatever sum the decedent might realize on the sale of certain real estate over and above a sum named, the sum to be paid in no event to exceed a certain amount. The property remained unsold for a period of eight years. The plaintiff claimed that this constituted a breach of the con-

tract. It was held that, although there was no express agreement on the part of the decedent to sell under the contract, there was nevertheless created an implied duty to sell within a reasonable time, and that a failure to sell after reasonable opportunities had arisen gave rise to a cause of action. Judge Werner cited approvingly the felicitous expressions of Judge Finch in *Genet* v. *D. & H. Canal Co., supra,* with regard to the implication of obligations under similar circumstances:

> "They always exist where equity and justice require the party to do or to refrain from doing the thing in question; where the covenant on one side involves some corresponding obligation on the other; where by the relations of the parties and the subject-matter of the contract a duty is owing by one not expressly bound by the contract to the other party in reference to the subject of it."

(3) Comment has been made by the appellees upon the terms of the Third paragraph (*Rec., p. 15*), which provides that the certificates of stock for the 14,900 shares "*sold and transferred as hereinbefore provided,*" were to be placed in possession of the Leipzig Company "as collateral security for the amount of the purchase price," and that as each annual installment with the additions for dividends received by the New York Company provided for in paragraph Second, subdivision (*d*) was paid, the New York Company "shall have the right to require the *redelivery* of, and the Leipzig Company will contemporaneously with the payment of each installment *redeliver* to the New York Company, one-fifth of said shares and thereupon the Leipzig Company shall continue to retain the remaining shares as collateral

security for the balance of the purchase price still payable." From this language is sought to be deduced an argument that no actual sale was intended, and in this connection the Fourth and Fifth paragraphs are also referred to in support of the claim.

This contention is, however, without merit. It having been provided in the earlier part of the instrument that the shares were *sold, assigned and transferred* to the New York Company and that the purchase price was to be paid in instalments over a period of five years according to the book value of the shares at the time when the several instalments were paid, it was but natural that the Leipzig Company should receive these shares, in pledge, "as collateral security for the amount of the purchase price." Had no security been given to the Leipzig Company that fact would have aroused suspicion. The giving of such security is an every-day transaction. The fact that the New York Company had the right to require the shares so held as collateral to be deposited with a bank or trust company to be selected by the Leipzig Company, until the purchase price or the balance remaining unpaid should have been fully paid, was likewise the adoption of a normal method for the protection of vendor and vendee alike. The provision that upon the payment of each instalment the Leipzig Company should, contemporaneously with the payment, "*redeliver*" to the New York Company one-fifth of the shares, was equally appropriate and did no more than to give expression to what would be justly called for under the circumstances. In the absence of such a provision the Leipzig Company might have insisted upon holding as collateral all of the shares

until the entire purchase price had been paid. It was, therefore, but natural that the New York Company should have returned to it a proportionate part of the collateral pledged as security for the payment of the purchase price. The omission of such a provision would have been impugned by the appellees.

(4) The contention that the Fifth paragraph is inconsistent with an executed sale is without foundation. It merely provides against the contingency that the New York Company might fail to pay some of the annual instalments when due. In that event it is provided, in the usual form, that the Leipzig Company shall notify the New York Company, in writing, that it requires the payment of the instalment then due, together with the additions, whereupon, "in the event that the New York Company shall not within sixty days after such demand pay the instalment with the additions, *then* the shares of stock or any remaining balance of it shall be forthhwith *retransferred* to the Leipzig Company on the books of the Botany Worsted Mills, and all rights of the New York Company to said stock or any such balance shall cease and the Leipzig Company shall retain the $5,000 paid on account * * * in full settlement of any claim against the New York Company and therefore neither of the companies shall have any further claim against the other arising under or by reason of the agreement" (*Rec., p. 16*).

It is to be noted in this connection that the $5,000 paid on the execution of the instrument by the New York Company was declared to be paid on account of the last or fifth instalment (*Rec., p. 15*). It was further expressly "understood that

the non-payment of any subsequent instalment shall not affect the portion or portions of the stock which may have been fully paid for by a previous instalment or instalments'' (*Rec., p. 16*).

How such a provision can be regarded as depriving the transaction of the character of a sale, it is difficult to understand. The use of the words ''redeliver'' and ''retransfer'' betoken a previous delivery and transfer, and a recognition of the fact that the parties intended that the transaction should constitute an executed sale, and not merely an executory contract or an option.

It is further to be observed that the Fifth paragraph does not, as has been claimed by the appellees, provide that the contract may be terminated at the option of *either* party; nor does it permit the New York Company to accomplish that result by forfeiting the $5,000 paid at the time of the execution of the contract. It is *only* in the event that any of the annual instalments with the additions represented by dividends declared, shall not be paid when due, that the *Leipzig Company acquires the right to a retransfer of the shares of stock, provided it gives the notice required and the New York Company shall then fail to pay the instalment that has matured.* It is only in that contingency that the claims of the respective companies against each other growing out of the agreement are to cease. In the absence of a demand and notice by the Leipzig Company (and there has been none), the New York Company continues to be liable for the unpaid portion of the purchase price. It is not enabled of its own volition to discharge itself from liability. It is only in the event that the Leipzig Company elects to pursue the remedy provided for in the Fifth

paragraph that the New York Company would be absolved from further liability. The suggestion, therefore, that this instrument merely confers an option upon the New York Company either to purchase the shares of stock or to refrain from purchasing them, as *it* may elect, is founded on a palpable misconception of the terms of the agreement. We repeat, that neither the word "option" nor anything that connotes it is to be found within the four corners of the document.

The words of Judge Andrews in *Wing* v. *Ansonia Clock Co.*, 102 N. Y. 534, 535, are most pertinent:

> "A mere right of forfeiture attached to a contract, is, of course, no answer to an action on a covenant of payment, or other covenant of the defaulting party. The forfeiture may be waived and the remedy is alternative and not exclusive."

In all of its phases this case comes directly within the decisions of this Court in *Stewart* v. *Griffith*, 217 U. S. 323, and *Western Union Telegraph Co.* v. *Brown*, 253 U. S. 101.

In *Stewart* v. *Griffith*, *217 U. S. 323*, the point in controversy was as to whether an instrument relating to the sale of real estate was an absolute contract of sale or merely an option to purchase. The instrument, after reciting the payment of $500 part purchase price of the total sum to be paid for the tract of land, provided that Griffith, as the agent of Ball, "hereby grants, bargains and sells, and agrees to convey by proper deed * * * duly executed by the said Ball to the said Stewart, the said two hundred and forty acres of land upon further payments and conditions hereinafter named, to wit: The balance of one-half of the

purchase price of the said two hundred and forty acres, more or less, at the rate of forty dollars per acre is to be paid to the party of the first part on the 7th day of November, 1903, and the remaining one-half of the total purchase price is to be divided into five equal payments secured by five promissory mortgage notes, secured by purchase money mortgage upon the said property to be given by the said Stewart and wife. * * * In case the remainder of the first half of the purchase price be not paid on November 7, 1903, then the said $500 so paid to the said Griffith is to be forfeited and the contract of sale and conveyance to be null and void, and of no effect in law, otherwise to be and remain in full force. * * * The possessory right to all of the said premises on the property mentioned herein is to remain in the said Ball until the one-half payment of the total purchase price herein provided for on November 7, 1903, has been fully paid and satisfied to the said L. A. Griffith agent."

It was adjudged that this instrument was not an option, but an absolute contract, Mr. Justice Holmes saying:

> "But in this case we are not confined to a mere implication of a promise from the penalty. The tenor of the 'agreement' throughout imports mutual undertakings. The $500 is paid as 'part purchase price of the total sum to be paid,' that is, that the purchaser agrees to pay. The land is described as 'being sold.' There are words of present conveyance inoperative as such but implying a concluded bargain, like the word 'sold' just quoted. So one-half of the purchase price 'is to be' and the notes secured by mortgage 'to be given'; and in the case of the burial lot Ball 'shall have paid to him' $40 if he elects to

> abandon it. * * * We are satisfied that Stewart bound himself to take the land. See *Wilcoxson* v. *Stitt, 65 Cal. 596; Dana* v. *St. Paul Investment Co., 42 Minn. 194.* The condition plainly is for the benefit of the vendor and hardly less plainly for his benefit alone, except so far as it may have fixed a time when Stewart might have called for performance if he had chosen to do so, which he did not. This being so, the word void means voidable at the vendor's election and the condition may be insisted upon or waived at his choice."

This case was followed in *Western Union Telegraph Co.* v. *Brown, 253 U. S. 101.* In the instrument there involved it was stipulated that Pitt and Campbell agreed to sell and deliver to Hastings and Lange, who agreed to buy, take and receive from them 625,000 shares of the Kennedy Consolidated Gold Mining Company, upon the following terms and conditions: First—The total price to be paid for the shares of stock to be $75,000 * * * payable $7,500 on the execution of the agreement; $11,250 on or before the 1st day of May, 1907; and the like sum on or before the 5th of July, 1907, the 5th of September, 1907, the 5th of November, 1907, the 5th of January, 1908, and the 5th of March, 1908. It was agreed that immediately upon the payment of the first-named sum Pitt and Campbell would deposit in escrow in and with the Lyon County Bank, of Yerington, Nevada, certificates of stock endorsed in blank representing in the aggregate 625,000 shares of the capital stock of the mining company, and would thereupon enter into an escrow agreement with Hastings and Lange and the bank, under which agreement the bank should hold the shares of stock

to be delivered to Hastings and Lange upon the payment by them of the final sum provided for, and the bank was constituted the agent of Pitt and Campbell for the purpose of receiving the payments under the agreement, and it was further agreed that in the event of default by Hastings and Lange the bank should be authorized under the terms of such deposit in escrow to deliver all the shares of stock so deposited with it to Pitt and Campbell, and all payments theretofore made by Hastings and Lange should be forfeited to Pitt and Campbell, and that thereupon all rights of each of the parties should forever cease and terminate.

On these facts the Circuit Court of Appeals decided (*248 Fed. Rep. 656*) that the contract was an option terminable by the act of the buyer in failing to make the payment on the contract. This Court was of a contrary opinion, viewing the contract as an absolute sale, Mr. Justice Day saying:

> "An option is a privilege given by the owner of property to another to buy the property at his election. It secures the privilege to buy and is not of itself a purchase. The owner does not sell his property; he gives to another the right to buy at his election.
>
> "What then is the nature of this agreement? It contains the positive undertaking of the owner to sell and the purchaser to buy 625,000 shares of stock upon terms which are named. Upon the first payment being made the certificates are to be deposited with the bank in escrow, to be delivered when the final payment agreed upon is made, and in the event of default in payment the bank is authorized to deliver the shares of stock to Pitt and Campbell, and all payments are to

be forfeited, and the rights of the parties to cease and determine. We are of opinion that this is far more than a mere option to purchase terminable at the will of the purchaser upon failure to make the payments required. The agreement contains positive provisions binding the owner to sell and the purchaser to buy upon the terms of the instrument. It is true the stock is to be deposited with the bank in escrow, and it is authorized to deliver the same to Pitt and Campbell upon default in payment. The findings do not show whether Pitt and Campbell took back the stock upon default of subsequent payments. There was no understanding that Pitt and Campbell should take back the stock when the payments were not made, and no agreement would put it in the power of the purchasers to relieve themselves of the obligations of their contract by failing to keep up the payments. The right of Pitt and Campbell to receive the stock from the bank and end the contract was stipulated; it was a provision inserted for their benefit, of which they might avail themselves at their election.

"In our opinion *Stewart* v. *Griffith*, *217 U. S. 323*, is controlling upon this point. * * * The condition in the contract in *Stewart* v. *Griffith* that non-payment should render the contract null and void is the equivalent of the stipulation in the present agreement, much relied upon by the respondents, that upon non-payment of the stipulated sums the rights of each of said parties shall cease and determine. We think the attempted distinction between *Stewart* v. *Griffith* and the instant case is untenable. * * * The fact that the contract contains a privilege of ending it at the election of the vendor for non-payment of the sum stipulated does not convert it into an option terminable by the purchasers at their will."

The concluding paragraph quoted from the opinion of Mr. Justice Day might have been written with equal effectiveness of Paragraph Fifth now under consideration.

There is nothing in the decisions in *The Elgee Cotton Cases, 22 Wall. 180* and *French* v. *Hay, 22 Wall. 231,* relied on by the appellees, that weakens our position. In both of these cases the contracts were unquestionably executory. Although, in the first of them, the vendors stated in the contract that they had sold unto the vendee their crops of cotton, the manifest intention, shown not only in the instrument but by the acts of the parties, was that title to the cotton was not to pass until it had been weighed, delivered and paid for by the vendee. The contract was a cash contract. No credit was intended. A part of the cotton was not in a deliverable state. No steps were ever taken to consummate the sale although the cotton was not seized until nine months after the making of the contract.

In the second of these cases the alleged agreement of transfer of the choses in action showed upon its face that the assignment was made conditioned "upon his (the transferees) payment to me (the assignor) of the above-named sum of $5,000 with interest from this date." It was accompanied by a power of attorney from the assignor to the alleged transferees, which was inconsistent with the theory of an executed sale and the divesting of the assignor's title. No part of the $5,000 was ever paid. Mr. Justice Strong said:

> "That instrument, however, called an assignment, was at most but an executory agreement to assign. Construed with the power

> of attorney made at the same time it admits of no other construction. The instrument was signed by Hay alone. French, the plaintiff, did not sign it, and it is not averred that he promised to pay the $5,000. Hay undertook only that French should hold the judgments and claims 'upon his payment' of the stipulated consideration with interest from the date. And the power of attorney given by Hay to French at the same time was an authority to deal with the securities in the name of Hay and for Hay. * * * The transmission of the title and the payment of the price were intended to be contemporaneous."

(5) Nor is there any warrant for the assertion that a failure to observe literally the provisions of the by-laws of the Botany Worsted Mills with respect to the transfer of these shares of stock on its books, made ineffectual the attempt of the parties to accomplish the immediate transfer of even the beneficial ownership of these shares of stock to Stoehr & Sons, Inc.

The Botany Worsted Mills is a New Jersey Corporation. Under the laws of that State shares of stock constitute personal property. Certificates of stock, as was held in *Mechanics Bank* v. *N. Y. & N. H. R. R. Co., 13 N. Y. 627*, are simply muniments and evidence of the holder's title to a certain number of shares in the property and franchises of the corporation of which he is a member.

This idea was accepted in *Jellenik* v. *Huron Copper Mining Co., 177 U. S. 1*, where Mr. Justice Harlan said:

> "The certificates are only evidence of the ownership of the shares, and the interest represented by the shares is held by the company

for the benefit of the true owner. As the habitation and domicile of the company is and must be in the State that created it, the property represented by its certificates of stock may be deemed to be held by the company within the State whose creature it is, whenever it is sought by suit to determine who is its real owner."

The mere possession of a certificate of stock or its transfer on the books of the corporation issuing it does not, therefore, determine the title, certainly not the equitable title.

Since a certificate of stock is not the stock itself, but merely written evidence of the ownership thereof and of the rights and liabilities resulting from such ownership, an owner of shares may as between himself and the transferee transfer his ownership or beneficial interest without a delivery of the certificates, a mere assignment or sale being sufficient.

Pendry v. *Carleton, 87 Fed. Rep. 41.*
Brigham v. *Mead, 10 Allen, 245.*
Lipscomb v. *Condon, 56 W. Va. 416; 67 L. R. A. 670.*
Francis v. *N. Y. El. Ry. Co., 17 Abb. N. C. 1; aff'd. 108 N. Y. 93.*
Scripture v. *Francistown Soapstone Co., 50 N. H. 571.*

In the last of these cases the Court said:

"The ownership of the shares passes from the seller to the buyer by force of the contract of sale and not by operation of law; and if that be so the buyer's title, so far as the seller is concerned attaches the moment this contract is fully consummated between them."

In *Black* v. *Zacharie, 3 How., U. S., 483,* it was recognized that even though the legal title to stock might not pass under a general assignment of property until the transfer is completed in the mode pointed out by the laws of the State where the corporation is organized, the equitable title will pass if the assignment of equitable interests in stock is not prohibited under the law of such State. Mr. Justice Story said:

> "The question is not here, whether the legal interest in the stock passed by the assignment before a transfer of the stock upon the books of the corporations; but whether the equitable interest therein, as contradistinguished from the legal interest, did not pass to and vest in the assignee by the law of Louisiana, so as to oust the right of any creditor with full notice of the assignment from divesting the title of the assignee by a subsequent attachment thereof as the property of the debtor. * * * Out of Louisiana, we believe that no such question could possibly arise; for courts of law, as well as courts of equity, are constantly, in all States where the common law prevails, in the habit of holding a prior assignment of the equitable interest in stock as superseding the rights of attaching creditors, who attach the same with a full knowledge of the assignment."

In *Grymes* v. *Howe, 49 N. Y. 17,* a gift *mortis causa* of shares of stock was held to confer the equitable title, where the donor made an absolute assignment of it to the plaintiff, which he handed to his wife to be delivered to the plaintiff upon his death. Judge Peckham said:

> "The equitable title to the stock was thus passed by the assignment and it was not necessary to hand over the certificate."

In *Johnson* v. *Underhill, 52 N. Y. 203,* it was held that the provisions of an act declaring that no transfer of stock should be valid for any purpose whatever until it shall have been entered in the book prescribed, did not affect, as between a vendor and vendee, the validity of an assignment in reality made, although the stock was not transferred in legal form. In the course of his opinion Judge Folger said:

> "For we are of the opinion that, under the operation of this twenty-fifth section, when the appellant sold and assigned the stock, his transferee assumed a position to the appellant analogous to that of a principal to his surety, or of a *cestui que trust* to his trustee. Ordinarily, when the holder of stock sells it, and delivers to the vendee the certificate therefor, with an executed power of attorney to transfer upon the books of the company, the vendee becomes the owner of all title, legal and equitable, thereto. (*McNeil* v. *Tenth National Bank,* 46 N. Y. 325.) But until the transfer upon the books is in fact made, the vendor is still the nominal owner; and he is, while such, to be treated as the trustee of the stock for his vendee. (*Commercial Bank of Buffalo* v. *Kortright,* 20 Wend. 91; and 22 id. 348.)"

See also,

Harvey v. *Stowe, 219 Fed. Rep. 22; aff'd. 241 U. S. 199.*

Chemical National Bank v. *Colwell, 132 N. Y. 250.*

Robinson v. *National Bank of New Berne, 95 N. Y. 642.*

Travis v. *Knox Terpezone Co., 215 N. Y. 259, 264.*

Matter of Ringler, 145 App. Div. 375.

Such is also the law of New Jersey.

Broadway Bank v. *McElrath, 13 N. J. Eq. 24, aff'd. sub. nom. Hunterdon County Bank* v. *Nassau Bank, 17 N. J. Eq. 496.*

"The requirement of a registry exists only for the protection and convenience of the corporation issuing the shares of stock."

See cases above cited.

In *Locke* v. *Farmers Loan & Trust Co., 140 N. Y. 135,* a holder of corporate stock executed a declaration of trust in it and retained possession of the stock. It was held that the equitable title passed to the beneficiary, Judge Finch saying:

"No beneficial interest in the property was left in himself, but the whole of that interest was by his own act vested elsewhere. He held the legal title to the stock, but necessarily held it, from the date of his declaration, as trustee for the beneficiaries. There was no formal transfer on the books of the company for himself as an individual to himself as trustee, and he remained the nominal owner, holding the naked and barren legal title. In such a case, as between a vendor and vendee of stocks, the vendor holds the legal title as trustee for the vendee, because the former, having parted with the entire beneficial interest, can hold the legal title in no other way."

It has likewise been held that the transfer of stock can be accomplished by a mere entry on the books of the company.

American National Bank v. *Oriental Mills, 17 R. I. 551, 23 Atl. Rep. 795.*

Here there was such a transfer concurrently with the execution of the instrument of February 20, 1917.

(6) In reply to the contention that the certificates of stock were not actually delivered to the New York Company, but remained in Germany, and that therefore no title passed, we refer to the decision in *Briggs* v. *United States, 143 U. S. 346.* It involved the right of the owner of cotton growing on plantations in Mississippi and seized by the forces of the United States during the Civil War, to recover the proceeds from the Government. The bill of sale for the cotton read: "I hereby sell and transfer to said C. M. Briggs all the cotton on my two plantations in Mississippi, near Egg's Point and Greenville. Said cotton so sold embraces all that I may have, baled and unbaled, gathered and ungathered." It was held that title to the cotton passed as between the vendor and vendee without actual delivery. Mr. Justice Field, after reviewing the authorities, said:

> "The delivery of the crops was not essential to pass title as between Morehead and Briggs. The law on the subject of the sale of personal property does not require impossibilities, as would be a delivery in a case of that kind. The cotton was not at the time grown ,and even if the sale be deemed incomplete until the actual appearance of the crop, it could not then be removed from the soil for delivery; besides, it was within the limits of a recognized enemy's country, and any attempt to transport it to the Union side for delivery would have been unlawful. By the common law a sale of personal property is complete and the title passes as between ven-

dor and vendee when the terms of transfer are agreed upon, without actual delivery."

See also,

Simmons v. *Swift, 5 B. & C. 857, 862.*
Gilmour v. *Supple, 11 Moore P. C. 551, 566.*
Willis v. *Willis, 6 Dana (Ky.) 48.*

II.

The transfer of the title to these shares to Stoehr & Sons, Inc., the New York Company was acccomplished on February 20, 1917, before there had been any declaration of war between the United States and Germany, and at a time when such transfer was entirely legal. The subsequent declaration of war, and the passage of the Trading with the Enemy Act did not invalidate such transfer or divest the transferee's title.

While it may be assumed for the purposes of this case, that, after war has been declared, contracts between citizens of the belligerent states may under some conditions be illegal, yet it has never been held that a contract, made prior to the declaration of war, which relates merely to the transfer of the title to property between the citizens of states subsequently becoming belligerents possesses any element of illegality. In fact the treaty between Prussia and the United States, which was in full force at the time of the declaration of war, contained provisions to the effect that, in the event of war, it would be lawful for the citi-

zens of the high contracting parties, for a period specified in the treaty, to remove their property from the enemy jurisdiction.

There is no principle of international law, of the common law or of statute law, which would have prevented a German subject at any time prior to April 6, 1917, from conveying to an American citizen or which would have forbidden the latter from accepting a conveyance of real property belonging to the former, or which would have prohibited the purchase by an American citizen from a German subject of chattels or choses in action at that time. The mere fact that there had occurred an interruption of diplomatic relations and that there was a likelihood that war would follow, did not change the status as to each other of the citizens of the United States and the subjects of Germany. They had not become enemies and had not lost the right to contract with one another. The very fact that a period of more than two months elapsed between the severance of diplomatic relations and the declaration of war indicated that it was still hoped, and possibly expected, that war might be averted. In the interval, as was conceded by appellees' counsel on the argument below, transactions of huge extent were carried on between the two countries, money was transmitted to and received by their respective banks, and extensive communications by the wireless telegraph took place between merchants and bankers of these countries, without let or hindrance.

It has been argued that, on the outbreak of the war, the contract was dissolved and became impossible of performance. That assumes that the transaction was merely an executory contract. It did not, however, partake of that character. It was executed to the extent of passing at least the

equitable title and ownership of the shares of stock which were the subject-matter of the contract. If the subject-matter of this contract had been real property and a deed had been executed which conveyed either the legal or the equitable title, and the grantee had given a mortgage or other security for the payment of the purchase price, the situation would have been the same as in the present case—while the title to the subject-matter of the contract had passed, the consideration was still to be paid. That did not, however, dissolve the executed contract. At the most it merely prevented the vendee from paying the purchase price to the subject of the enemy state until the end of the war, and in the meantime our Government by proper legislation and proceedings thereunder, might have enabled to require the vendee to pay the consideration in accordance with the terms of the contract to its duly designated officials.

Appellees' counsel have treated the case as though the New York Company had merely secured a right to maintain an action for specific performance. That is not the case. That corporation had become the equitable owner of the shares of stock. Although the equitable title had passed out of the Leipzig Company, the legal title to the shares was vested in Hans E. Stoehr and Max W. Stoehr as trustees and they as such trustees had transferred the share to the New York Company. There was, therefore, no occasion for bringing a suit for specific performance.

But even if there were, our courts would not have withheld relief against a defendant enemy, and under the principle decided in *Jellenik* v. *Huron Copper Mining Co., 177 U. S. 1,* such an action might have been brought in our courts. In

fact a suit for specific performance was, under similar circumstances, held maintainable in *Compagnie Universelle de Telegraphie et de Telephonie Sans Fil* v. *United States Service Corporation, 95 Atl. Rep. 187*, affirmed by the New Jersey Court of Errors and Appeals in *96 Atl. Rep. 292*.

It is true that the case just cited arose between a French corporation and a German corporation and that at the time when the action was brought we were not at war with Germany. Nevertheless it is clear that, even if the suit had been instituted by an American corporation after the war, the same reasons which prompted the Court to exercise jurisdiction in that case would have been applicable to a similar controversy arising after the United States had entered the war.

In this connection it is also important to observe, that not only was this contract executed at a time when we were still at peace with Germany, but there was nothing in our jurisprudence which contemplated that these shares of stock should, on the outbreak of the war, be seized by our Government as enemy property, even in the absence of the contract of February 20, 1917. Nor was there any legislation looking to the seizure of enemy owned property of this character having its situs in the United States until the enactment of the Trading with the Enemy Act on October 6, 1917, exactly six months after the declaration of war.

This is significant because of the doctrine laid down in the leading case of *Brown* v. *United States, 8 Cranch, 109*, where it was held that British property found in the United States on land at the commencement of hostilities with Great Britain in 1812, could not be condemned as enemy property without a legislative act authorizing its

confiscation, and that the act of Congress declaring war was not such an act. Chief Justice Marshall said:

> "The war gives to the sovereign full right to take the persons and confiscate the property of the enemy wherever found, is conceded. The mitigations of this rigid rule, which the humane and wise policy of modern times has introduced into practice, will more or less affect the exercise of this right, but cannot impair the right itself. That remains undiminished, and when the sovereign authority shall choose to bring it into operation, the judicial department must give effect to its will. But until that will shall be expressed, no power of condemnation can exist in the court.
>
> The questions to be decided by the court are: 1st. May enemy's property, found on land at the commencement of hostilities, be seized and condemned as a necessary consequence of the declaration of war? 2d. Is there any legislative act which authorizes such seizure and condemnation?
>
> Since, in this country, from the structure of our government, proceedings to condemn the property of an enemy, found within our territory at the declaration of war, can be sustained only upon the principle that they are instituted in execution of some existing law, we are led to ask—Is the declaration of war such a law? Does that declaration, by its own operation, so vest the property of the enemy in the government, as to support proceedings for its seizure and confiscation, or does it vest only a right, the assertion of which depends on the will of the sovereign power?
>
> The universal practice of forbearing to seize and confiscate debts and credits, the principle universally received, that the right to them revives on the restoration of peace, would seem to prove that war is not an abso-

lute confiscation of this property, but simply confers the right of confiscation. Between debts contracted under the faith of laws, and property acquired in the course of trade, on the faith of the same laws, reason draws no distinction; and although, in practice, vessels, with their cargoes, found in port, at the declaration of war, may have been seized, it is not believed that modern usage would sanction the seizure of the goods of an enemy on land, which were acquired in peace, in the course of trade. Such a proceeding is rare, and would be deemed a harsh exercise of the rights of war. But although the practice in this respect may not be uniform, that circumstance does not essentially affect the question. The inquiry is, whether such property vests in the sovereign, by the mere declaration of war, or remains subject to a right of confiscation, the exercise of which depends on the national will; and the rule which applies to one case, so far as respects the operation of a declaration of war on the thing itself, must apply to all others over which war gives an equal right. The right of the sovereign to confiscate debts being precisely the same with the right to confiscate other property found in the country, the operation of a declaration of war on debts and on other property found within the country must be the same. * * * The modern rule, then, would seem to be, that tangible property belonging to an enemy and found in the country at the commencement of war, ought not to be immediately confiscated; and in almost every commercial treaty, an article is inserted stipulating for the right to withdraw such property. This rule appears to be totally incompatible with the idea, that war does of itself vest the property in the belligerent government. It may be considered as the opinion of all who have written on the *jus belli*, that war gives the right to confiscate, but does not itself confiscate the property of the enemy; and their rules go to

the exercise of this right. * * * That the declaration of war has only the effect of placing the two nations in a state of hostility, of producing a state of war, of giving those rights which war confers; but not of operating, by its own force, any of those results, such as a transfer of property, which are usually produced by ulterior measures of government, is fairly deducible from the enumeration of powers which accompanies that of declaring war. 'Congress shall have power' 'to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water.' It would be restraining this clause within narrower limits than the words themselves import, to say, that the power to make rules concerning captures on land and water is to be confined to captures which are extra-territorial. If it extends to rules respecting enemy property found within the territory, then we perceive an express grant to Congress of the power in question, as an independent substantive power, not included in that of declaring war. * * * Commercial nations, in the situation of the United States, have always a considerable quantity of property in the possession of their neighbors. When war breaks out, the question, what shall be done with enemy property, in our country, is a question rather of policy than of law. The rule which we apply to the property of our enemy, will be applied by him to the property of our citizens. Like all other questions of policy, it is proper for the consideration of a department which can modify it at will; not for the consideration of a department which can pursue only the law as it is written. It is proper for the consideration of the legislature, not of the executive or judiciary. It appears to the court, that the power of confiscating enemy property is in the legislature, and that the legislature has not yet declared its will to confiscate property which was within our territory at the declaration of war."

The doctrine of this case has never been questioned, and conforms with humane traditions of which we have hitherto been justly proud.

See also,

Conrad v. *Waples, 96 U. S. 284.*
U. S. v. *1756 Shares of Stock, 5 Blatchf. 237.*
Britton v. *Butler, 9 Blatchf. 462.*
U. S. v. *Bales of Cotton, Woolw. 262.*
McVeigh v. *Bank, 26 Grattan 200.*

Consequently, even had there been a certainty that war between the United States and Germany would presently occur, it was in no way illegal to enter into such a contract as that which we are now considering. In view of the attitude of our Government from August 1, 1914, through all of the weary months of the great European war, it was reasonable to believe that, if we should become embroiled in that conflict, we would not depart from the considerations which underlie the opinion of the great Chief Justice in *Brown* v. *United States, supra.* To say, therefore, as appellees have contended, that this contract was made for the purpose of defeating the United States of its belligerent rights, is in total disregard of this accepted doctrine. This is especially true when one bears in mind that the consideration to be paid for the shares of stock purchased from the Leipzig Company was not removed out of the jurisdiction of our Government and remained subject to capture in the event that Congress should eventually determine that enemy property within the territory of the United States might be seized.

III.

The contention that the sale of these shares of stock was merely colorable and that the contract was intended as a fraud upon our Government, is without merit.

In determining the *bona fides* of the contract of sale as between the parties thereto and our Government, it is important to take into account the state of the law, as understood at the time when the contract was entered into, with respect to the effect of a possible war on privately-owned property within our jurisdiction.

Attention has already been directed to the opinion of Chief Justice Marshall in *Brown* v. *United States, 8 Cranch, 109.* Contemporaneously with that decision Chief Justice Kent in *Clarke* v. *Morey, 10 Johns. 68, 72,* learnedly discussed the subject from the historic standpoint:

> "The rigour of the old rules of war no longer exists, as *Bynkershoek* admits, when wars are carried on with the moderation that the influence of commerce inspires. It may be said of commerce, as *Ovid* said of the liberal arts: *Emollit mores, nec sinit esse feros.*
>
> "We all recollect the enlightened and humane provision of *Magna Charta* (c. 30) on this subject; and in France the ordinance of Charles V. as early as 1370, was dictated with the same magnanimity; for it declared that in case of war, foreign merchants had nothing to fear, for they might depart freely with their effects, and if they happened to die in France, their goods should descend to their heirs. (*Henault's Abrege Chron. tom. 1. 338.*) So all the judges of England resolved, as early as the time of Henry VIII that if an

alien came to England, before the declaration of war, neither his person, nor his effects, should be seized in consequence of it. (*Bro. tit. Property, pl. 38. Jenk. Cent. 291. Case 22.*) And it has not become the sense and practice of nations, and may be regarded as the *public law of Europe*, (the anomalous and awful case of the present violent power on the continent excepted,) that the subjects of the enemy, (without confirming the rule to merchants,) so long as they are permitted to remain in the country, are to be protected in their persons and property, and to be allowed to sue as well as to be sued. (*Bynk. Quaest. Jur. Pub. b. 1. c. 7. c. 25. s. 8.*) It is even held, that if they are ordered away, in consequence of the war, they are still entitled to leave a power of attorney, and to collect their debts by suit. (*Emerigon, Traite des Assurances, tom. 1. 567.*)

"Modern treaties have usually made provision for the case of aliens found in the country, at the declaration of war, and have allowed them a reasonable time to collect their effects and remove. *Bynkershoek* gives instances of such treaties, existing above two centuries ago; and for a century past, such a provision has become an established formula in the commercial treaties. *Emerigon*, who has examined this subject with the most liberal and enlightened views, considers these treaties as an affirmance of common right, or the public law of Europe, and the general rule is so laid down by the later publicists, in conformity with this provision. (*Vattel, b. 3. c. 4. s. 63. Le Droit Public de L'Europe, par Mably. Oeuvres, tom. 334.*) Some of these treaties have provided that foreign subjects should be permitted to remain and continue their business, notwithstanding a rupture between the governments, so long as they behave peaceably; (Treaty of Commerce between Great Britain and France, in 1786, and

of Amity and Commerce between Great Britain and the United States, in 1794); and where there was no such treaty, the permission has been frequently announced in the very declaration of war. Sir Michael Foster (*Discourse of High Treason, 185, 186.*) mentions several instances of such declarations; and he says that the aliens were thereby enabled to acquire personal chattels, and to maintain actions for the recovery of their personal rights, in as full a manner as alien friends. The act of congress of July, 1798, before alluded to, provides, in cases where there may be no existing treaty, a reasonable time, to be ascertained and declared by the president, to alien enemies resident at the opening of the war, 'for the recovery, disposal and removal of their goods and effects.' This statute may be considered, in this respect, as a true exposition and declaration of the modern law of nations."

In *1 Kent's Commentaries, pp. *56-66*, this doctrine is vigorously maintained.

Not only did these authorities formulate the policy of our country, but their views are supported by modern writers on international law.

Thus in *Wheaton on International Law, Fifth English Edition (1916)*, p. 421, it is said:

"It appears, then, to be the modern rule of international usage, that property of the enemy found within the territory of a belligerent state, or debts due to his subjects by the government or individuals, at the commencement of hostilities, are not liable to be seized and confiscated as prize of war. This rule is frequently enforced by treaty stipulations, but unless it be thus enforced it cannot be considered as an inflexible, though an established, rule." See also *pp. 424-426.*

Our Government sanctioned this policy in its early treaties. Thus in the treaty between Great Britain and the United States negotiated in 1794 and proclaimed in 1795, Article X declares:

> "Neither the debts due from individuals of one nation to individuals of the other, nor shares, nor moneys, which they may have in the public fund or in the public or private banks, shall ever in any event of war or national differences be sequestered or confiscated, it being unjust and impolitic that debts and engagements contracted and made by individuals having confidence in each other and in their respective governments, should ever be destroyed or impaired by national authority on account of national differences and discontents."

In the treaty of amity and commerce between the United States and Prussia, concluded on January 11, 1799, and proclaimed on November 4, 1800, which bears the signature of John Quincy Adams, it is expressly provided:

> "Art. XXIII. If war should arise between the two contracting parties the merchants of either country then residing in the other shall be allowed to remain nine months to collect their debts and settle their affairs, and may depart freely carrying off all their effects without molestation or hindrance * * *."

Article XXIV of the same treaty, which dealt with the treatment of prisoners of war, concluded as follows:

> "And it is declared that neither the pretense that war dissolves all treaties, nor any other whatever, shall be construed as annulling or suspending this and the next preceding article; but on the contrary that the state of

> war is precisely that for which they are provided, and during which they are to be as sacredly observed as the most acknowledged articles in the law of nature and nations."

Article XVI of that treaty contained the most favored nation clause, as did likewise Articles IX and XII of the treaty of May 1, 1828, between the two countries, which continued in force the provisions of Articles XXIII and XXIV. The German Empire succeeded to the rights and duties of Prussia under this treaty (*The Appam, 243 U. S. 124; Shultz, Jr., Co., Inc.* v. *Raimes & Co., 99 Misc. 626*).

Referring to the treaty with Prussia, Alexander Hamilton, in *Camillus Letters XXII*, spoke of it as a model of liberality for the principles it contained and stated that it had been the subject of deserved and unqualified admiration in our country. He especially mentioned Article XXIII above quoted.

See also *Camillus Letters XVIII and XXII.*

In *Westlake's International Law, Part II* (*1907*), that distinguished publicist exhaustively discusses the development of the policy which protects property and rights of an enemy subject within the territory of a belligerent state (*pp. 36-48*). After referring to the modern treaties, he says:

> "Permission to enemy subjects to remain in the country, even if in the express words of the treaty it should happen to stand alone, must in common sense carry with it permission to enjoy their property while so remaining. And if enemy subjects being in the country may enjoy their property, it would be inequitable to confiscate that of those who are not in it and therefore as individuals

cause no danger. This has been admitted by the conclusion of many treaties in which it is expressly stipulated that the debts, shares in public funds or in companies, and moneys in banks of the respective subjects, shall not be sequestered or confiscated in case of war. The system of the treaties may therefore be deemed to amount to a general agreement, on the part of governments, that modern international law forbids making prisoners of persons or confiscating the property of enemy subjects in the territory at the outbreak of war, or, saving the right of expulsion in case of apprehended danger to the state, refusing them the right of continued residence during good behavior."

In *Twiss' Law of Nations, Part II, Sections 49-56*, and *Hall on International Law, Seventh Edition (1917), Section 144*, as well as in *Phillmore's Commentaries on International Law, vol. 3, pp. 147, 148*, there is a like recognition of this modern doctrine.

In *Oppenheim on International Law, vol. 2, Second Edition, Section 102*, the author thus expresses his views on the subject:

"In former times all private and public enemy property, immovable and movable, on each other's territory could be confiscated by the belligerent at the outbreak of war, as could also enemy debts; and the treaties concluded between many states with regard to the withdrawal of each other's subjects at the outbreak of war stipulated likewise the unrestrained withdrawal of such private property of their subjects. Through the influence of such treaties, as well as of municipal laws and decrees enacting the same, an international usage and practice grew up that belligerents should neither confiscate private enemy prop-

> erty nor annul enemy debts on their territory. The last case of confiscation of private property is that of 1793 at the outbreak of the war between France and Great Britain. No case of confiscation occurred during the nineteenth century, and although several writers maintain that according to strict law the old rule, in contradistinction to the usage which they do not deny, is still valid, it may safely be maintained that it is obsolete, and that there is now a customary rule of international law in existence prohibiting the confiscation of private enemy property and the annulment of enemy debts on the territory of a belligerent."

Not only did the American decisions and the opinions of publicists which we have quoted lay down these principles, but the English courts expressed the same views.

Thus, in *Wolff* v. *Oxholm, 6 Maule & Selwyn, 92,* decided in 1817, a British subject sued a Danish subject for a debt which the latter alleged had been confiscated by the Danish Government under an ordinance issued by it at the commencement of war with Great Britain in 1807. Lord Ellenborough, deciding for the plaintiff, said that the Court had been unable to discover that there ever was a time when it was the general practice of nations to confiscate debts; that although there had been instances of such confiscation in the sixteenth and seventeenth centuries, yet there had not been a single instance found for something more than a century. The Court accordingly held that as the Danish ordinance was not conformable to the usage of nations, the parties could not respect

it and neither they nor the Court were bound to regard it.

See also:

Porter v. *Freudenberg, L. R., 1 K. B. (1915) 857*;
Mrs. Alexander's Cotton, 2 Wall. 404-419;
Hanger v. *Abbott, 6 Wall. 532.*

This was the state of the law when the sale of its shares in the Botany Worsted Mills was made by the Leipzig Company to the New York Company. The parties had the right to believe that, even if war should ensue, our Government would recognize, so far as it was concerned, the validity of the transfer. The vendor had the assurance that, even in the event of war, it would be protected in the enjoyment of its property, and that it would have the right, so far as it was capable of being carried away, to remove its property from our territory. An actual transfer made before the declaration of war, even though there had been a suspension of diplomatic relations, was, therefore, effective, as authorized by law, by treaty, and by custom, and at the same time was in every way consonant with ethics and good morals.

But we may go further and assume that these parties might have anticipated a state of war, even though at the time when the contract was entered into, there was still reason to believe that war between the United States and Germany might be averted, yet they certainly could not have been expected to anticipate the terms of the Trading with the Enemy Act passed on October 6, 1917, nearly eight months after the execution of the contract. Until the passage of that law the doc-

trine of *Brown* v. *United States, supra,* must have been regarded as in full force and controlling. There was then nothing upon the statute books granting to the Government the right to capture the property of the subject of a nation, either actually or potentially an enemy, where such property had its situs within our territory. It would, therefore, be abhorrent to one's sense of justice to charge the parties to this contract, at the time they entered into it, with the intent and purpose of circumventing a law, not yet contemplated, relating to a state of war that did not exist.

How inconsistent would such a theory be with the principles laid down by Hamilton in *Camillus Letters XIX*:

> "The right of holding or having property in a country always implies a duty on the part of its government to protect that property, and to secure to the owner the full enjoyment of it. Whenever, therefore, a government grants permission to foreigners to acquire property within its territories, or to bring a deposit it there, it tacitly promises protection and security.
>
> "There is no parity between the case of the person and goods of enemies found in our country and that of the persons and goods of enemies found elsewhere. In the former there is a reliance upon our hospitality and justice; there is an express or implied safe conduct; the individuals and their property are in the custody of our faith; they have no power to resist our will; they can lawfully make no defense against our violence; they are deemed to owe a temporary allegiance; and for endeavoring resistance would be punished as criminals, a character inconsistent with that of an enemy. To make them a prey is, therefore, to infringe every rule of generosity and

equity; it is to add cowardice to treachery. In the latter case there is no confidence whatever reposed in us; no claim upon our hospitality, justice, or good faith; there is the simple character of an enemy, with entire liberty to oppose force to force.

"Moreover, the property of the foreigners within our country may be regarded as having paid a valuable consideration for its protection and exemption from forfeiture; that which is brought in commonly enriches the revenue by a duty of entry. All that is within our territory, whether acquired there or brought there, is liable to contributions to the treasury, in common with other similar property. Does there not result an obligation to protect that which contributes to the expense of its protection? Will justice sanction upon the breaking out of a war, the confiscation of a property which, during peace, serves to augment the resources and nourish the prosperity of a state?

"The property of a foreigner placed in another country, by permission of its laws, may justly be regarded as a deposit, of which the society is the trustee. How can it be reconciled with the idea of a trust, to take the property from its owner when he has personally given no cause for its deprivation?"

Had the Leipzig Company, in anticipation of war between the United States and Germany, undertaken to sell its shares of stock in the Botany Worsted Mills, at either private or public sale, at any time prior to April 6, 1917, the act would have been unquestionably valid and free from criticism and the purchaser would have acquired good title. Even after April 6, 1917, and at any time prior to October 6, 1917, it could unquestionably have sold its shares under the protection of the treaty with Prussia proclaimed in

1800, and of the principles of international law that we have discussed. It would have been likewise lawful, at any time prior to the Declaration of War, to have organized an American corporation to acquire these shares of stock and to eliminate the title of the Leipzig Company. If the latter, by virtue of the terms of such sale, became the creditor of the purchaser for the whole or any part of the purchase price, the validity of the sale would not thereby have been affected, and title would none the less have passed. Under the authorities which we have just discussed even the debt owing by the purchaser to the Leipzig Company could not have been made the subject of capture without the enactment by Congress of an express statute authorizing such capture. As has been shown that was not done until October 6, 1917. Hence, the transfer made by the Leipzig Company to the New York company, far from being fraudulent or savoring of bad faith, was hemmed about with legal sanctions. To predicate fraud upon these facts would in itself amount to bad faith.

We have thus far discussed this phase of the case on the theory that the legal title to the shares in the Botany Worsted Mills that had belonged to the Leipzig Company was not undertaken to be transferred until February 20, 1917. In fact, the transfer of the legal title to those shares of stock to Hans E. Stoehr and Max W. Stoehr, as trustees, took place in 1915, long before it was ever seriously contemplated that war would arise between the United States and Germany. The contract of February 20, 1917, transferred the equitable title remaining in the Leipzig Company, and concurrently with that transfer, Hans E. Stoehr and Max W. Stoehr as the holders of the

legal title, acting in accordance with the terms of the contract actually transferred the legal title to the shares upon the books of the Botany Worsted Mills to the New York Company.

When the possibility of war was recognized in February, 1917, the parties therefore had the right to do just what they did. The Botany Worsted Mills was an important industry, and in view of the fact that Hans E. Stoehr and Max W. Stoehr were residents of the United States, the latter a citizen and the former desirous of becoming a citizen, it was entirely natural, under the circumstances, for such a transfer to be made, thus making it possible to preserve and conduct the business without embarrassment, and, as the sequel showed, to enable that great industry to be utilized in the manufacture of materials required by our Government for carrying on the war.

We might rest this branch of our argument here, but we prefer to analyze the various contentions of the appellees from which they seek to deduce the inference of fraud and in which is predicated the conclusion that the sale of the shares was colorable.

(1) The claim of fraud is based on the fact that the co-partnership of Stoehr & Sons transferred its assets to Stoehr & Sons, Inc., thus enabling the latter to carry on business, which the partnership could not have done in the event of war—a perfectly valid transaction. It is based on the further fact that the proceedings resulting in the incorporation and the acquisition of the property of the partnership were carried into effect by means of resolutions apparently prepared in advance of the meeting. This was in conformity with the almost uniform practice prevailing with respect to the formation of corporations.

(2) It is argued that this transaction was carried out with haste. There is nothing in the record distinguishing the method of organization here pursued from that resorted to in thousands of other instances. It is said that under the terms of the copartnership, transactions involving more than $25,000 were not permitted except with the approval of all of the members of the firm. The uncontradicted evidence is, that this rule, almost from the very beginning, was with the consent of all of the parties more honored in the breach than in the observance (*Rec. p. 121*). At the most, a disregard of this provision was merely an irregularity and did not render a transaction ignoring it void. It certainly does not lie with the appellees to question the validity of the transfer because of a disregard of such a provision. There is, however, nothing in the record to show that the transfer was not in fact made with authority from the European members of the partnership. Hans E. Stoehr, who died shortly after the outbreak of the war and who executed the instruments which are now sought to be attacked, presumptively had authority to act in the premises. The maxim *omnia praesumuntur rite esse acta* is applicable to the facts here disclosed.

(3) Fraud is also sought to be predicated on the fact that there was an alleged failure to comply with the complicated procedure adopted with respect to the transfer of shares of stock in the Botany Worsted Mills, where the stock certificates were in Germany. For the reasons already stated a variance from this procedure did not affect the validity of the transfer of the equitable title to the shares, and, for the same reason, cannot be deemed

to have constituted a fraudulent transfer. So far as the Alien Property Custodian is concerned, he was certainly not a *bona fide* purchaser of the shares of stock. There is no question here as to creditors, or as to liability to the corporation for calls or assessments. The fact, therefore, that the transfer was made in an informal, rather than in a technically formal, manner cannot be made the predicate of a charge of fraud.

(4) But it is argued that the terms of sale were of such a character as to evince the intention that, notwithstanding the transfer, the control of the shares was to be left with the Leipzig Company, and that there was in fact no sale. A further analysis of the contract will show that there is no justification for such an argument.

It is true that only $5,000 were paid on account of the purchase price at the time of the sale. It is likewise true that the sale was to be for a full and adequate consideration. The price was to "be determined by" and to "be equal to the book value of said shares as shown by the books of the Botany Worsted Mills" (*Rec. p. 14*). In view of the fact that the price was to be payable in five instalments covering a period of five years, it was stipulated that each of these instalments was to be based upon and to be equal to the book value of the shares as shown by the last previous closing of the books of the Botany Worsted Mills on the 30th of November preceding the falling due of each of the annual instalments (*Rec. p. 15*). In fixing such valuation the net worth of the "hard assets," that is, the tangible property, of the Botany Worsted Mills was to be the basis for the computation of the value of these shares, and

it was expressly stipulated that "no allowance or increase shall be made on such instalment for good will" (*Rec. p. 15*).

The contract therefore secured to the New York Company as a potential profit, not only the value of the existing good-will, but all such increase in the good-will as time would develop. In lieu of interest on the deferred payments it was stipulated that, in addition to the book value of the shares, there should be taken into consideration and account the amount of dividends received by the New York Company during the period elapsing before the final payment of the several instalments. These dividends were to be apportioned, based on the amount of the purchase price remaining unpaid. This was entirely equitable to both parties.

(5) It is argued that the New York Company did not have sufficient assets to pay for these shares in accordance with the terms of payment. That overlooks entirely the fact that the New York Company had assets amounting to upwards of $1,000,000 (*Rec. p. 116*) independently of the 14,900 shares of the Botany Worsted Mills; that considering the character of the property of the Botany Worsted Mills, the fact that the New York Company controlled a majority of the capital stock of that important company, that under the terms of this contract it had the benefit of the good-will of that corporation so far as it was reflected in the shares of stock acquired, there would have been no difficulty for it to have financed this transaction. There are few industrial companies that could have made a better financial showing than the Botany Worsted Mills. The facts set forth

in the prospectus issued by the Alien Property Custodian substantiate this statement (*Exhibit 10, Rec. p. 204 to 209*). There are many bankers in the City of New York who would have been ready to finance the undertaking, especially in view of the fact that the men who had grown up with the business would have continued their connection with it.

To say, therefore, that this transaction was on its face fraudulent or colorable, totally disregards well recognized methods of corporate finance. If the purchase price based on book value had been paid on February 20, 1917, to the Leipzig Company, it would then have been argued on behalf of the appellees that such payment at that period constituted a badge of fraud, because it enabled the Leipzig Company to transfer its property out of the jurisdiction of the United States. And the same argument is made when the purchase price payable to the Leipzig Company still remains in this country subject to seizure by our Government under the Trading with the Enemy Act, as, in fact, it has been seized. One would suppose that, of the two methods, the latter is certainly less susceptible to the imputation of fraud than the former, and, far from bearing the earmarks of invalidity, establishes the good faith and honesty of purpose underlying the transaction.

(6) We shall pay no attention to the claim that fraud could be predicated on the fact that the Leipzig Company was given a lien on these shares as collateral security for the payment of the purchase price or such part of it as remained unpaid. Our Government certainly has not been deprived of any potential rights by reason of that fact. There has been nothing to prevent it from seizing

the rights of the Leipzig Company as such creditor and from taking to itself the benefit and advantage of the lien thus created. If no such lien had been conferred, then it might have been argued with some force that the transaction was subject to suspicion. The fact that such security was conferred made it entirely normal.

(7) It is further asserted that the failure to pay the first instalment when due operated as a retransfer to the Leipzig Company of the shares of stock, and that the non-payment of an instalment of the purchase price for a single day after the date of its maturity operated as a forfeiture of the rights of Stoehr & Sons, Inc., to these shares. That conclusion is entirely at variance with the terms of the contract. In the first place, forfeitures are not favored in the law. In order to create a forfeiture it is necessary to proceed in strict conformity with the contract. The Fifth paragraph requires the Leipzig Company to notify the New York Company in writing that it requires the payment of the instalment before there can be any forfeiture. It is only in the event that the New York Company shall within sixty days after such demand fail to pay the instalment that the stock is to be retransferred to the Leipzig Company on the books of the Botany Worsted Mills. It is only then that the rights of the New York Company to the stock shall cease. No such notice was ever given by the Leipzig Company. No basis for a forfeiture has therefore been created.

Moreover, the Alien Property Custodian has undertaken to seize these shares of stock and to contest the right of Stoehr & Sons, Inc., to their ownership. To claim, therefore, that these shares of stock were to be retransferred to the Leipzig

Company is contrary to the express terms of the contract.

Furthermore, it is to be remembered that at the time when the first instalment became payable, the Trading with the Enemy Act had been enacted. Sections 2 and 3 expressly forbade the payment of any debt or obligation to an enemy. The Leipzig Company was at that time an enemy. The vested rights of the New York Company could not be divested or forfeited because of non-payment of its debt to an enemy.

(8) But it is further argued that these provisions show that the Leipzig Company reserved to itself the control of the shares of stock of the Botany Worsted Mills by virtue of this agreement. There is absolutely nothing in the instrument to warrant such an interpretation. Every provision contained in it was calculated merely to protect the interests of the Leipzig Company as a creditor of the New York Company. The latter as the legal or equitable owner of these shares, had full control over them. It exercised that control by voting on these shares. The record shows that Max W. Stoehr voted as proxy for the New York Company on 20,780 shares of the Botany Worsted Mills, which included these 14,900 at the election held at the instance of the Alien Property Custodian when his nominees were chosen as directors (*Rec., pp. 113 to 116, 161, 247*). On the other hand, the Leipzig Company merely had a lien on the shares in order to secure the unpaid purchase money, just as it would have had a lien upon a piece of real estate for which it received a purchase money mortgage for the land. The provision for a retransfer in the event of the non-payment of the purchase money was similar in

character. When one considers the date when this contract was made, and the fact that for nearly eight months thereafter Congress had not even legislated so as to enable it to capture the claim of the Leipzig Company for the unpaid purchase money, it is applying in its most obnoxious form the *post hoc propter hoc* method of reasoning.

(9) In support of these phases of their argument the appellees rely on *"The Benito Estenger," 176 U. S. 568*, and other cases hereinafter mentioned. There a vessel, belonging to subjects of Spain and residents of Cuba, was during the progress of the Spanish-American war transferred by bill of sale to a British subject. The vessel was engaged in trading between Jamaica and Cuba and was captured while on a voyage. At the time of her capture she had a Spanish crew and Spanish officers, the former owner was on board as supercargo, and the Spanish flag was in the locker of the vessel, though at the moment of capture she was flying the British flag. There was no proof that the former owner was a Cuban rebel or had renounced his allegianec to Spain. Under the circumstances it was concluded that the transfer was merely colorable. In fact it was admitted by the claimant's counsel that it would not be contended that all of the interest of the former owner in the vessel ceased at the time of the sale, that the transfer was obviously made to protect the steamer as neutral property from seizure, that he still retained a beneficial interest after the sale and transfer of flags, and continued to act for the vessel as supercargo. The transfer of the vessel was thus made *flagrante bello*, and she continued to trade with the enemy in supplies necessary for his forces after the transfer, just as she had before.

It was in the light of these facts that the Court, quoting from Hall's International Law, intimated that a transfer of a vessel at such a time is not held to be good "if it is subjected to any condition or even tacit understanding by which the vendor keeps an interest in the vessel or its profits, a control over it, a power of revocation, or a right to its restoration at the conclusion of the war."

This case is in no wise parallel, and none of the elements emphasized in the case cited is present here. The transaction was completed before the declaration of war. The Leipzig Company had no interest in the shares of stock, as such, but merely held them as collateral security. It retained no control over the shares. It possessed no power of revocation of the contract. Nor had it the right to have the shares restored to it at the conclusion of the war.

There were certainly no "strings" to the present transaction. The Leipzig Company parted unconditionally with its right of property in the shares. It retained merely the right to be paid the agreed purchase price, and as collateral security for such payment was given possession of the shares.

Nor is this case governed by *The Carlos F. Roses, 177 U. S. 655,* and the authorities which it cites. That vessel was captured during the Spanish-American War while proceeding to Havana with a cargo of provisions. She was owned at Barcelona and sailed from that port for Montevideo, Uruguay, with a cargo which was discharged there, where she took on board for Havana the provisions in question. A British company doing business in London laid claim to the cargo on the ground that they had advanced money for its purchase to a citizen of Monte-

video and received bills of lading covering the shipment. It was held that the vessel was an enemy vessel. The presumption was that the cargo was enemy property. That this presumption had not been overcome is apparent from the opinion. Neither was it shown that the British company had acquired the legal title to the merchandise which constituted the cargo. The fundamental proposition decided, however, was that the right of capture acts on the proprietary interest of the thing captured at the time of the capture and is not affected by the secret liens or private engagements of the parties. Consequently the belligerent right was held to override the neutral claim. The authorities referred to in the opinion of Chief Justice Fuller all relate to cases in which there appeared to be enemy ownership of the title to the property seized.

In this fundamental respect the present case differs *in toto* from that cited. The proprietary interest of the thing captured or seized in the present case, 14,900 shares of the capital stock of the Botany Worsted Mills, was at the time of its capture in the New York Company, and at the time of seizure these shares of stock stood in the name of that Company in the books of the Botany Worsted Mills.

It is also important to bear in mind the distinction between property at sea and property on land that is recognized in the modern authorities on international law, and likewise the distinction between property as to which there is merely an agreement to deliver and that as to which, as in the present case, there has been so far as is practicable an actual delivery. It should not for a moment be forgotten that the shares of stock in the Botany Worsted Mills that stood in the name

of Hans E. Stoehr and Max W. Stoehr, as trustees, were transferred by them to Stoehr & Sons, Inc., the New York Company, immediately upon the execution of the contract of sale on February 20, 1917. These conditions not only distinguish this case from *The Benito Estenger, supra,* but also from the other authorities cited in the opinion of Judge Hand (*Rec., p. 317*).

In *Wheaton's International Law, 5th English Edition, p. 568*, the author says:

> "The progress of civilization has slowly but constantly tended (in theory) to soften the extreme severity of the operations of war by land; but it still remains unrelaxed in respect of maritime warfare, in which the private property of the enemy taken at sea or afloat in port is liable to capture and confiscation, subject, however, to the already mentioned exemptions relative to enemy merchant vessels on the outbreak of war, hospital ships, fishing vessels, cartel ships, &c., and to the exemption introduced by the Declaration of Paris."

On *page 574* the author says:

> "It is often a matter of difficulty for a prize court to determine to whom property captured at sea actually belongs. The general rule is that if goods are shipped on account and at the risk of the consignee, they are considered his goods during the voyage. In such a case the delivery of the goods to the master is a delivery to the consignee (*The Packet de Bilboa, 2 C. Rob. 133*). In time of peace the parties may, of course, agree to any terms they please as to whose risk the property should be at during the voyage, but in time of war, or in contemplation of war, the rule of prize courts is that property which has a hostile character at the commencement of the voyage, cannot change that character

by assignment while it is in transitu so as to protect it from capture. (*The Vrow Margaretha, 1 C. Rob. 336.*)"

See also:

2 Twiss' Law of Nations, §§162, 163.
Hall's International Law, 7th ed., §§169-174.

The Jan Frederick, 5 Ch. Rob. 128, involved the transfer *in transitu* of property while at sea.

In *The Sechs Geschwistern, 4 Ch. Rob. 100,* the subject-matter of the proceeding was a ship of which there had been no actual sale. The contract relating to its contained an express agreement to restore it to the enemy vendor at the end of the war.

In the case of *The Jemmy, 4 Ch. Rob. 31,* the ship remained uninterruptedly in trade for the belligerent power and under the control and management of the enemy.

The Vrow Margaretha, 1 C. Rob. 336, related to the transfer of a shipment of wine *in transitu.* Sir William Scott there said:

"In the ordinary course of things in time of peace—for it is not denied that such a contract may be made, and effectually made (according to the usage of merchants) such a transfer in transitu might certainly be made. It has even been contended that a mere delivering of the bill of lading is a transfer of the property. But it might be more correctly expressed, perhaps, if said that it transfers only the right of delivery; but that a transfer of the bill of lading with a contract of sale accompanying it, may transfer the property in the ordinary course of things, so as effectually to bind the parties, and all others, cannot well be doubted. When war in-

tervenes, another rule is set up by courts of admiralty which interferes with the ordinary practice. In a state of war, existing or imminent, it is held that the property shall be deemed to continue as it was at the time of shipment *till the actual delivery;* this arises out of the state of war, which gives a belligerent a right to stop the goods of his enemy."

The Baltica, 11 Moore, P. C. 141, likewise related to the seizure of a ship. It was under Danish colors when seized. It had previously flown the Russian flag. When the Crimean War was imminent the vessel, while in the course of a voyage from Libau to Copenhagen, was sold. She arrived at her destination and was taken into possession by the purchaser. It was held that the sale, though made whilst the ship was *in transitu,* was valid, since the *transitus* had ceased when the vessel had come into the possession of the purchaser, which occurred before the seizure. In reaching this conclusion the Privy Council carefully reviewed the authorities, and the theory of the decision is expressed in the following passage:

> "It is true that, in one sense, the ship and the goods may be said to be in transitu till they have reached their original port of destination; *but their Lordships have found no case where the transfer was held to be inoperative after the actual delivery of the property to the owner.* That the transitus ceases when the property has come into the actual possession of the transferee, is a doctrine perfectly consistent with the decisions * * * on the authority of which the former case was decided."

In *The United States, L. R. Prob. Div. (1917) 30,* the rule was stated that in time of war goods shipped from an enemy country to a neutral coun-

try, or from a neutral country to an enemy country, are regarded as enemy property, *qua* the rights of belligerent captors, *until delivery.*

In *The Bawean, L. R. Prob. Div. (1918) 58*, the property seized was shipped from a Chinese port on a German vessel bound to Hamburg. While still *in transitu* it was sold by the German owners to a neutral. It was held that it retained the enemy character until it reached its destination.

The Daska, L. R. App. Cas. (1917) 386, and *The Southfield, L. R. App. Cas. (1917) 390*, likewise related to property at sea at the time of its transfer which took place at a time when war was imminent. In both cases special circumstances led the Court to deny the right of condemnation.

None of these cases referred to a transfer of property on land, and in none of them was the doctrine of the right of capture applied in a case where there had been a delivery prior to the time when capture was attempted. Consequently they afford no authority for the appellees' contention. Indeed they support appellant's position.

Judge Hand recognizes that the judgment rendered in *The Baltica, supra*, does not sustain his theory. He frankly admits that there is a difficulty in his reasoning so long as "a policy of land capture" has not been inaugurated. That such a policy had not been inaugurated at the time of the outbreak of the war between the United States and Germany, or until the enactment of the Trading with the Enemy Act on October 6, 1917, must necessarily be conceded. Hence the infirmity of the attempted analogy between a capture on land and a capture at sea at once becomes apparent.

The soundness of our contention is further accentuated by Section 7 (b) of the Trading with the Enemy Act, which Judge Hand himself re-

gards as effectively closing the discussion on this point. That provision reads:

> "* * * no person shall by virtue of any assignment, * * * to him of any * * * chose in action by * * * an enemy or ally of enemy have any right or remedy against the debtor, obligor or other person liable to pay, fulfill or perform the same unless said assignment * * * was made prior to the beginning of the war * * *."

This clearly recognizes the validity of a transfer of a chose in action made before the beginning of the war. Under the decision in *Jellenik* v. *Huron Copper Co., 177 U. S. 1*, an assignment of an interest in rights to shares of stock is to be regarded as analogous to an assignment of a chose in action. Consequently, as Judge Hand admits, the principle applies "*a fortiori* to equitable interests in shares."

There can be no question as to the soundness of his conclusion as to this phase of the subject, whatever may be said as to the method by which it is reached (*Rec. p. 318*):

> "It can scarcely be supposed that an exception would be made in favor of *ante bellum* transfers of choses in action which did not apply to property so nearly akin as this, or indeed to all property, and it is clear that absolute transfers of choses in action before April 6, 1917, would be valid. Apparently the United States meant not to inquire into such transfers as in fraud of its rights. There is no reason to extend the application of so penal a statute beyond its fair import."

(10) The ultimate ground of the decision of the Court below is that, in the making of the contract,

it was intended that the beneficial ownership of the Leipzig shares was always to remain in the Leipzig Company; "that there never was any transfer at all" (*Rec. p. 317*), and that "the contract conveyed nothing to Stoehr & Sons, Inc." (*Rec. p. 318*), the instrument being "not a contract of purchase, but only an option" (*Rec. p. 314*).

It has been shown under Point I that the instrument of February 20, 1917, immediately followed by a transfer of the shares on the books of the Botany Worsted Mills to the New York Company, was not the grant of an option, but an absolute sale and transfer of the ownership of the Leipzig Company in the shares. If the transfer was, as has been shown, free from fraud, for the reasons above discussed, then its validity cannot be questioned by the Government. To say that the contract conveyed nothing if it was an absolute transfer free from fraud, is an obvious inconsistency. If, in legal effect, it operated as a transfer, it cannot at the same time be a mere colorable transfer. It certainly was intended to pass the title of the shares to the New York Company.

We are not concerned with any questions that may or may not arise between the shareholders of the Leipzig Company and the New York Company. No claim has been made on behalf of those shareholders questioning the validity of the transfer or the sufficiency of the consideration. There is no pretense that there has been any disavowal of it by them or on their behalf. Nor has there been any question as to the authority of Hans Stoehr to make the transfer. Judge Hand in his opinion says (*Rec. p. 312*), that he assumes "that Hans E. Stoehr had a general authority which

would cover the execution of contracts for the sale of such property as this for a consideration such as this."

In support of the conclusion that the instrument was "not intended to represent the real purpose of the parties at all, but to serve as a cover for another purpose," reference was made in the opinion to the terms of the contract of February 20, 1917, and to the statements made by Hans E. Stoehr and by Mr. Heyn to the Alien Property Custodian at about the time of the seizure. We shall now briefly consider these propositions.

I.—*The claim that the contract cannot be justified either as a sacrifice sale or as a commercial transaction is unsound.*

This contention is based on the theory that the business of the Botany Worsted Mills had been successful, had been in operation for twenty-eight years, that its plant was extensive and admirably equipped, that there was no reason for the Leipzig Company to dispose of its interests in the corporation, and that the consideration to be paid for the 14,900 shares of stock by the New York Company was inadequate.

This theory loses sight of the essential facts, that at the time when this contract was entered into, although it was entirely lawful for the Leipzig Company to sell its interest in the Botany Worsted Mills, a critical situation had arisen—diplomatic relations between the United States and Germany had been severed. Although there was no certainty that war would ensue, it was not at all improbable that it would. It was self-evident that, if the two governments became belligerents, the Leipzig Company would be unable to

participate in the management of the Botany Worsted Mills, and that the affairs of that corporation would encounter serious practical difficulties and embarrassment. Although at that time it could not have been foreseen that in the contingency of war our Government would seize the shares formerly owned by the Leipzig Company, it was but natural that the latter should recognize the desirability of its retirement from the American field, while it was still possible to do so, and thereby avoid the hazards that might flow from the abnormal conditions that were likely to prevail.

On the other hand the New York Company, two of its stockholders, Hans E. Stoehr and Max W. Stoehr, being residents of this county and one of them an American citizen, and the other seeking to become one was not encountering the risks with which the Leipzig Company might have to reckon in the event of war. They had every reason to believe that an American company, under their management, would not be disturbed in its conduct of the business of the Botany Worsted Mills. By means of such management the integrity of the undertaking would not be imperiled or disturbed.

The purchase of the stock owned by the Leipzig Company by the New York Company was, therefore, a conservative transaction on the part of the vendor and vendee alike. The general purpose of preventing the dismemberment of the Botany Worsted Mills was a sufficient reason for the purchase by the one and for the sale by the other of the parties. The transaction, in the then state of the law and under the then existing conditions, was not only a legitimate, but a practical, commercial transaction.

The assertion that the consideration reserved in the contract was inadequate because the item of good-will was not a factor in the ascertainment of the purchase price, proceeds on an erroneous theory. The contract would have been more susceptible of criticism had the New York Company, at that juncture, bound itself to pay, not only the book value of all of the "hard assets," but also the value of the good-will. It would then have been argued that there was no reason why the New York Company should incur all the hazards and pay the Leipzig Company the last dollar of valuation that could be placed upon the shares owned by it in the Botany Worsted Mills. It is a matter of common experience that, in the sale of an important business or of a large block of shares in a business corporation, the element of good-will is eliminated in whole or in part in fixing the purchase price. It is likewise a matter of common knowledge that the market value of the shares of stock of a corporation does not control in fixing the price to be paid for a considerable block of such shares. Sometimes the market value exceeds the book value, and at other times the converse is the fact. In the circumstances under which this contract was made it was just to both parties that the contract should provide for the ascertainment of the book value at the various dates when the instalments of the purchase price were to be paid and the stock which was held in pledge was to be surrendered. In order to give the vendee an incentive to enter into the contract, it was but reasonable that the purchaser should have the benefit of the good-will, and that it should not be separately valued at the various dates when the book value was to be ascertained

in order to swell the purchase price to the disadvantage of the purchaser.

Moreover, good-will is property of an evanescent nature. It is easily volatilized. The possibility of a war, whose outcome could not be foreseen, of itself tended to deteriorate, or at least threaten to diminish seriously, the value of the good-will of an industrial business such as that of the Botany Worsted Mills. When the Leipzig Company, therefore, under the contract, was to receive the book value of its "hard assets," eliminating the value of its good-will, the bargain that was made was not to its disadvantage, but was fair to both sides.

The fact that the price of the stock was not specifically named in the contract, but was to be determined at the various periods when the book value was to be ascertained, does not tend to make the transaction colorable. The subject-matter of the contract constituted approximately a half interest in a corporation whose property was worth many millions of dollars. The value of this property was subject to fluctuation. It consisted largely of machinery that was likely to deteriorate physically and to become more or less obsolescent. It consisted also of raw materials the market value of which might suddenly rise, or with equal suddenness fall. This was likewise true of its merchandise manufactured or in process of manufacture. Its real estate was in constant jeopardy from the elements. It would have been the height of imprudence for the New York Company to have stipulated on February 20, 1917, to pay the then book value of this large property and thus assume all of the possible risks. On the other hand, it was fair to both parties and tended

to equalize the risks to make the price dependent upon the book values as they would be ascertained at the respective periods when the instalments of the purchase price were to be paid. It must be remembered that the Leipzig Company was retiring from the American field. The New York Company was to take its place. The former could not, therefore, expect to be guaranteed against any possible shrinkage in values during the period of time covered by the deferred payments, and the New York Company was to pay on what was an entirely equitable basis. If the contract had undertaken to fix the price according to the book values as ascertained on its date, there would have been infinitely stronger ground for questioning the *bona fides* of the sale. It might then have been said that the transaction was not in essence an ordinary and rational commercial transaction, because the New York Company would have burdened itself with all of the risks and would have practically disabled itself from deriving any potential profit from the transaction.

When one considers that the Alien Property Custodian is proposing to sell in one block these 14,000 shares of stock at public auction, under the stringent limitation of the statute restrictive of possible purchasers, where there is a certainty that the value of these shares will be sacrificed, the method adopted by the Leipzig Company and the New York Company of ascertaining the price was not only normal, but precisely what reasonable men of business would have done had they intended the transaction to be in every way genuine.

II.—*The argument based on the letter of Heyn to the Alien Property Custodian.*

The interpretation given by Judge Hand to this document is erroneous and does not take into account either the conditions under which it was written or those to which it referred. Stoehr & Co., the predecessor of Stoehr & Sons, Inc., was a partnership composed of Germans and Americans. It was naturally feared that if war should be declared the partnership would be dissolved. That would necessarily seriously embarrass and hamper the business theretofore conducted by the partnership. In order to avoid the consequences that would have been thereby entailed the corporation was organized and the partnership interests were converted into stockholding interests, the proportions of the previous partnership interests being maintained.

The belligerent rights of our Government in the event of the outbreak of war would have been in no wise affected by this incorporation. Under the Trading with the Enemy Act, subsequently passed, the interests of the German stockholders could be captured, as in fact they were, to the same extent as their partnership interests might have been captured had there been no incorporation. The creation of a corporation, however, avoided the winding up and destruction of a lawful business, and enabled it to be carried on by an American corporation, which was necessarily under the control and supervision of the State of New York, under whose laws it became incorporated.

The acquisition by this New York corporation of 14,900 shares of the stock of the Botany Worsted Mills was likewise intended to conserve

the business of the latter corporation and to avoid the mismanagement or waste that might result were the control and management to fall into the hands of a small minority of stockholders. These 14,900 shares were held by Hans E. Stoehr and Max W. Stoehr as trustees for the Leipzig Company. The latter was the beneficiary of the trust. Being a German corporation it was certainly doubtful whether, in the event of war, the trustees would have been entitled to vote on the stock which they held in trust for the Leipzig Company. If they were precluded from so voting, then the voting power would have been vested in the minority stockholders and the owners of these 14,900 shares would have been completely in the power of the minority. For that reason it was believed that a sale by the Leipzig Company to the New York Company, which was under the control of Hans E. Stoehr and Max W. Stoehr, would prevent the dismemberment and possible destruction of the Botany Worsted Mills. That such a transfer would be valid was never for a moment doubted, both because of the terms of the treaty between the United States and Germany and because of the doctrines which we have heretofore discussed. In the event of war and the subsequent enactment of the Trading with the Enemy Act such a transfer would in no wise have interfered with the exercise of the war powers of our Government, the interests of the German stockholders in the New York Company could have been captured, and any amount owing by the New York Company to the Leipzig Company could likewise have been captured.

Judge Hand has expressly found that there was no fraud in carrying out the plan and that illegality could not be predicated of it. Why, then,

should the transaction be characterized as merely colorable when there was every reason, prompted by interest and prudence, for making it actual and genuine?

Read in the light of these facts, the letter of Mr. Heyn (*Defendants' Exhibit F; Rec. pp. 218-223*), which was likewise approved by the Botany Worsted Mills and the New York Company (*Rec. p. 233*), in every way sustains our contention that the transfer was not colorable. He was naturally anxious to exonerate himself and his clients from any imputation that he or they were seeking to circumvent and defeat the right of the Alien Property Custodian to seize enemy property. It was written at a period of great stress and at a time when the very name of a German gave rise to ugly suspicion and animadversion, and when every presumption was hostile and threats were quite prevalent. Referring to the organization of Stoehr & Sons, Inc., he said (*Rec. pp. 220, 221*):

> "The immediate occasion for the organization of the corporation in February, 1917, was this: It was assumed that if there was a declaration of war between the United States and Germany, the partnership would probably have to cease, being dissolved by reason of the alien enemy character of Eduard Stoehr, the father, and George Stoehr, the brother, the results of such dissolution being of course obviously unfortunate and conceivably disastrous.
>
> The partners retained the same proportional interest in the corporation as their interest in the partnership. * * * In other words somewhat more than 4/5 the interest in parties resident in Germany.
>
> The certificate of incorporation and by-laws of the company provide for four directors.

They are as follows:

HANS E. STOEHR, President,
GEO. ROEHLIG, Vice-President,
MAX W. STOEHR, Secretary and Treasurer,
ALFRED DE LIAGRA, Assistant Secretary and Assistant Treasurer.

It will be noted that these directors and officers are the same gentlemen mentioned above as directors and officers, etc., of Botany Worsted Mills and that all of them are residents of the United States.

As has been pointed out, the founder of the Botany Worsted Mills was Eduard Stoehr. As he is advanced in age (being 72 years) most of the active work during the past years has devolved on his sons. In this connection it may be stated generally that Eduard Stoehr, the father, and George Stoehr, the brother, were in charge of the Stoehr interests in Germany, and H. E. Stoehr and M. W. Stoehr of the interests in the United States. H. E. Stoehr represented his father and also Stoehr & Company, the Leipzig corporation, in this country."

He then explains the details of the stock control of the Botany Worsted Mills and shows that the beneficial interest of the 14,900 shares in the name of H. E. Stoehr and M. W. Stoehr, trustees for the Leipzig Company, was in that corporation.

He then frankly explains the contract of February 20, 1917 (*Rec. p. 222*), saying:

> "Regarding the contract for the purchase of said 14,900 shares by Stoehr & Sons, Inc., from Stoehr & Co. of Leipzig, Germany, it has been fully explained that the control of Botany might be imperiled by a state of war, because the voting right on stock of alien enemies or in which alien enemies had the beneficial interest (as was the case with said 14,900 shares) was doubtful under the deci-

sions of the courts, and if deprived of the voting right, the control of Botany might be lost. This contract was made with reference to the control of Botany as between its stockholders and had of course no reference to the status of such control so far as the Alien Property Custodian is concerned. Such status is not affected whether such shares are in Stoehr & Co., the Leipzig corporation, or in Stoehr & Sons, Inc., the New York corporation. * * *

To summarize: While Botany is managed in this country, considerably more than a majority of its stock is controlled by alien enemy interests within the meaning of the Alien Enemy Act; the total of the stock thus controlled (directly and indirectly) being 30,080 shares."

To say that Mr. Heyn, who expressed himself with such clarity as is evidenced by this letter, used the word "controlled" in the sense of "owned" is without justification. He was communicating with the Alien Property Custodian at a time when the latter was seeking to ascertain what, if any, interests alien enemies had in Stoehr & Sons, Inc., and in the Botany Worsted Mills. There was no attempt at concealment. The motives that prompted the organization of the New York Company and the transfer to it of the 14,900 shares were stated with entire accuracy. Mr. Heyn was interested in showing that the rights of the Government were in no manner prejudiced by a sale of the 14,900 shares to the New York Company, or by the transfer by the partnership of Stoehr & Co. of its assets to the New York Company. Looking at the subject from the standpoint of the Alien Property Custodian, he pointed out that the controlling interest in the stock of the New York Company was in German enemies

and that their interests could be captured by the Government if it so desired, and through such capture not only could the New York Company, but the Botany Worsted Mills, be controlled by the Alien Property Custodian.

Far from interfering with the belligerent rights of our Government, they were subserved by what had been lawfully done before the declaration of war. What Mr. Heyn was anxious to establish was that neither he nor his clients had been guilty of any unlawful acts. That they were not is conceded by Judge Hand, and is unquestionably shown by the authorities. It is a far cry between an insistence upon the good faith of all concerned and the explanation of their motives as given by Mr. Heyn and the conclusion from such statement that the contract of February 20, 1917, was merely colorable.

IV.

The equitable title to the shares of the Botany Worsted Mills having passed from the Leipzig Company to the New York Company on February 20, 1917, the fact that the consideration was to be paid later and that the shares of stock pledged as collateral security were to be redelivered from time to time as the instalments of the purchase price were paid, did not affect the title or render the contract executory and subject to dissolution upon the declaration of war.

Here, again, the status of the property is precisely the same as it would have been had it been a parcel of real estate located in New Jersey and

conveyed by the Leipzig Company to the New York Company subject to a lien for unpaid purchase money in favor of the Leipzig Company or to a mortgage to secure the unpaid purchase price. It would be futile to contend that, because the purchase money had not been paid by the New York Company prior to the declaration of war or the passage of the Trading with the Enemy Act, the executed contract under which it acquired its title became dissolved. So far as the transfer of title was concerned, the transaction became a completed one. So far as the obligation of the New York Company to pay was concerned, that rested *in futuro.*

The debt of the New York Company to the Leipzig Company was subject to capture and seizure under the Trading with the Enemy Act, and, as the record shows, it has in fact been seized. It would have been unlawful for the New York Company after the declaration of war, and certainly after the passage of the Trading with the Enemy Act, to pay to the Leipzig Company the instalments of the purchase price as they matured. Consequently the performance of the obligation to pay was suspended. That company could not, pending the war, have enforced payment, whatever the Alien Property Custodian may have done.

Cohen v. *N. Y. Mutual Life Ins. Co., 50 N. Y. 610;*

Sands v. *New York Life Insurance Co., 50 N. Y. 626;*

New York Life Insurance Co. v. *Statham, 93 U. S. 24.*

Mutual Benefit Life Ins. Co. v. *Hillyard, 37 N. J. Law, 444.*

The appellees have sought to bring this case within the decisions in *Zinc Corporation, Ltd.* v. *Hirsch, (1916) 1 K. B. 541* and *Bieber & Co.* v. *Rio Tinto Co., Ltd., (1918) App. Cas. 260.* We contend that neither of them presents a parallel. Both were contracts executory in character. In neither of them was the question presented as to whether the title to property had passed from the vendor to a vendee not an enemy or the ally of an enemy.

In the first of the cases the plaintiff, a British corporation, agreed to sell to the defendants and the latter, who resided and carried on business in Germany, agreed to purchase during each of ten years from 1910 to 1919, both inclusive, the whole of the plaintiff's production of zinc concentrates at their mine in Australia. By the terms of the contract the plaintiffs were prohibited, so long as the contract should be in force, from selling any zinc concentrates to any person other than the defendants, who were entitled at any time to leave 2200 tons of concentrates on the plaintiff's floors and 800 tons in their vats at the plaintiff's expense. The contract contained a "*force majeure*" clause, which provided that in the event of the happening of any of the contingencies specified the agreement should be suspended during the continuance of any and every disability specified. After the outbreak of the war between Great Britain and Germany an action was brought for a declaration that the contract had been dissolved by the existence of the war. It was evident that the contract, so far as it was sought to be dissolved, related to future production and future deliveries. There was no pretense that title to the zinc concentrates to be produced thereafter during the term of the contract had passed or that payment

had been made for such production. It was also held that the *force majeure* clause related only to the suspension of deliveries, and not to the whole contract, and that the prohibition against selling to any person other than the defendants was to prevent the plaintiffs from using their resources for the benefit of England. For these reasons the Court very properly held that the further performance of the contract after the outbreak of the war became illegal as being detrimental to the interests of the country and of assistance to the King's enemy. In the course of the opinion of Lord Justice Swinfen Eady he said:

> "The result is that the outbreak of war has dissolved the contract between the parties so far as regards *the future performance after August 4, 1914.* The remedy of either side for what had previously been carried out remains in abeyance until the termination of the war. * * * There remains, however, another point of view from which the matter must be considered. The contract of 1910 not only provided that the defendant shall purchase the plaintiff's whole production, but it also stipulates that the plaintiff shall not sell their concentrates to any other person. This negative stipulation remains in force according to the tenor of the agreement as well during a war as during a temporary strike or accident or breakdown of machinery."

The second of the cases cited arose under agreements made before the war between Great Britain and Germany for the supply by the Rio Tinto Company of cupreous sulphur ore to three German companies. The vendor agreed to sell to the vendees a specified tonnage of ore to be shipped from Spain and to be delivered in Rotterdam, Hamburg, Stettin, or other European continental

ports. At the outbreak of the war a substantial part of the ore still remained to be delivered. Subsequent to the beginning of the war the Rio Tinto Company commenced actions against the several vendees for the abrogation of the contracts. These cases clearly came within the principle of *Zinc Corporation* v. *Hirsch*. The opinion of Lord Dunedin showed the *ratio decidendi* to be that a state of war between Great Britain and another country would put an end to all executory contracts which for their further performance require commercial intercourse between one contracting party, a British subject, and the other contracting party, an alien enemy. Special attention was directed to the fact that the dates of delivery under one of the contracts "so far as not performed, extended from August, 1914, to February, 1915, during which time a state of war has prevailed. It is also obvious that all dates of delivery under the second contract from February 1, 1915, up to the present time have been rendered illegal by the war."

Lord Sumner in his opinion laid stress on the same features of the case, saying:

> "The rule of law which forbids a British subject to trade with the King's enemies is very ancient. Its effect upon trading contracts which, like the present, are executory on both sides, was already well settled by the middle of the last century. *Esposito* v. *Bowden, 7 E. & B. 763*, finally answered the last of the questions which had been raised down to that time."

Again he said:

> "The whole contract, so far as it is mutually executory, is dissolved."

In the present case the title to the 14,900 shares of stock of the Botany Worsted Mills passed at once from the Leipzig Company to the New York Company on February 20, 1917. The payments to be made by the latter could of course not be made, while the war was pending, to the Leipzig Company. A debt for the purchase price from the New York Company to the Leipzig Company had come into existence concurrently with the passing of title. That debt was subject to seizure, under the Trading with the Enemy Act, by proceedings taken in conformity with the terms of that act. Such seizure was in fact attempted, and assuming that the requirements of the statute had been complied with, that debt became collectible on its maturity by the Alien Property Custodian. In the absence of such seizure the enforcement of the obligation incurred by the New York Company to the Leipzig Company was suspended; just as a liability on a promissory note for goods sold and delivered would have been suspended.

It would be most extraordinary if the appellees' contention should be sustained, namely, that although title to property may have passed, before the declaration of war, to an American corporation or to an American citizen from a German subject, that title would be divested if the vendee was not called upon by the terms of the contract to make payment in whole or in part prior to the declaration of war. There is such a manifest incongruity in such contention and the consequences of its adoption would be so disastrous, that elaboration of argument seems unnecessary to establish its unsoundness. The cases cited certainly do not support it. In fact the decision in *New York Life Insurance Co.* v. *Davis*, *95 U. S. 429*, goes so far as to hold that the rule that war suspends all

intercourse between the citizens of two belligerent countries does not prohibit the payment of debts to an agent of an alien enemy where such agent resides in the same state with the debtor. If such payment were legal, certainly the fact of non-payment by an American citizen or corporation of an obligation incurred to an alien enemy who has parted with the title to the property from the sale of which the obligation to pay arose cannot operate as a dissolution of the executed contract of sale or as a divestiture of the title that has passed.

V.

Stoehr & Sons, Inc., the owner of these shares, being an American corporation, was not an enemy or ally of an enemy within the meaning of the "Trading With the Enemy Act." Consequently these shares of stock were not subject to capture or seizure under its terms, and the act of the Alien Property Custodian in condemning them as enemy-owned property, upon his determination that they were such, was without jurisdiction and void.

Under Point II it has been shown that even the property of an enemy cannot be seized on land in the absence of an act of Congress authorizing such seizure.

Brown v. United States, supra.

Such an act is highly penal in its character. It is in derogation of the common law. It involves a

forfeiture. It contravenes the humane and wise policy which seeks to mitigate the rigors of war and to exempt individuals from punishment for the wrongs committed by their government.

Cohen v. *N. Y. Mutual Life Insurance Company* (*supra*).

As was said in the case of "*Mrs. Alexander Cotton*," *2 Wall 404, 419*:

> "This rule as to property on land has received very important qualifications from usage, from the reasonings of enlightened publicists and from judicial decisions. It may now be regarded as substantially restricted 'to special cases dictated by the necessary operation of the war,' and as excluding, in general, 'the seizure of the private property of pacific persons for the sake of gain.'"

For these reasons, such statute must be strictly construed against the Government. The soundness of this doctrine is well illustrated by decisions under the Confiscation Acts of 1861 and 1862. The operation of these acts was limited strictly to the persons and property enumerated. They were held not to apply to the property of a corporation, *Risley* v. *Phenix Bank, 83 N. Y. 318, aff'd. 111 U. S. 125; Planters Bank* v. *Union Bank, 16 Wall. 496;* or to land alienated before their passage, *Conrad* v. *Waples, 96 U. S. 279;* or to the estate of a party other than the one for whose offences the property was seized, *ib.;* or to a mortgagee or lienor whose rights attached to the property prior to the commission of the offence for which it was attempted to confiscate it, *Day* v. *Micou, 18 Wall. 156; Shields* v. *Schiff, 124 U. S.*

351; Waples v. Hays, 108 U. S. 6; Aveguo v. Schmidt, 113 U. S. 293.

The act under which the Alien Property Custodian has sought to condemn the rights of Stoehr & Sons, Inc., in the 14,900 shares of the capital stock of the Botany Worsted Mills expressly limits its operation to the property of an enemy and ally of enemy. Section 2 defines the word "enemy" as used in the act. So far as it is necessary to quote, it reads:

> "(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory."

Stoehr & Sons, Inc., having been organized under the laws of New York and the Botany Worsted Mills having been incorporated under the laws of New Jersey, neither of them comes within the term "enemy" as so defined.

The words "ally of enemy," so far as that term is material in this case, are defined to mean:

> "(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation which is an ally of a nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of such

ally nation, or incorporated within any country other than the United States and doing business within such territory."

Under this definition neither Stoehr & Sons, Inc., nor the Botany Worsted Mills is an ally of an enemy.

The most minute and microscopic examination of the statute shows that no property other than that of an enemy or ally of an enemy comes within the purview of this legislation. With the greatest care there is repeated and reiterated the phrase "an enemy or ally of enemy." This necessarily excludes from the operation of the act those who are not enemies or allies of an enemy and all corporations organized within the United States. The Act, so far as corporations are concerned, is limited to those formed within the territory of a nation with which the United States is at war, or of an ally of a nation with which the United States is at war, or incorporated within any country other than the United States and doing business within such territory.

The Trading with the Enemy Act is modeled upon the British Act. Under its provisions it was held in *Re Ruben (1915) 2 Ch. 313,* that the act concerned itself "only with enemy property," and that "all that could be vested in the Custodian is enemy property."

See also Senate Committee Report on the Trading with the Enemy Act, p. 9; House Committee Report, printed as an Appendix to Senate Committee Report, pp. 11, 12, and the statement of Mr. Lee C. Bradley in Hearings Before House Committee on Interstate and Foreign Commerce on H. R. 1238, p. 13.

The fact that a majority of the capital stock of Stoehr & Sons, Inc., is owned by enemies or is represented by voting trust certificates belonging to enemies, does not convert the corporation into an enemy within the meaning of the statute. The corporation is an independent legal entity and its character is not affected by the status of the owners of even a majority of its stock.

Fritz Schultz, Jr., Co. v. *Raimes & Co., 99 Misc. Rep. 626, aff'd. 100 Misc. Rep. 697;*

Society for the Propagation of the Gospel v. *Wheeler, 22 Fed. Cas. 58, 2 Gall. 105;*

Bank of the United States v. *Deveaux, 5 Cranch. 61;*

St. Louis & S. F. Ry. Co. v. *James, 161 U. S. 545;*

Stumpf v. *A. Schreiber Brewery Co., 242 Fed. Rep. 80;*

Posselt v. *D'Epard, 100 Atl. Rep. 893.*

The use of the words "incorporated within any country other than the United States," as contained in Section 2, sub-division (a), of the Trading with the Enemy Act, disposes of any question as to the status of a corporation organized in the United States whose shareholders may be "enemies" within the definition of the act. This purpose was made very clear by the Assistant Attorney General Warren on the hearings before the Sub-Committee of the House of Representatives which formulated the statute. (*Huberich on Trading with the Enemy, pp. 33-34.*) He said:

> "We have specifically abstained in the bill from attempting to go behind the corporate charter. If the corporation is an American corporation, then it can do business in this country. * * * In England they attempted to go behind the charter of an English corporation, and they attempted to hold that the English corporation, which was controlled by German stockholders, was an enemy within the purview of their Act, and they landed in inextricable confusion. * * * Here we have solved that by saying we will not go behind the corporate charter no matter how many German stockholders there may be."

The English decision to which Mr. Warren referred was unquestionably *Daimler Company, Ltd.* v. *Continental Tire and Rubber Company, Ltd., 2 App. Cas. (1916) 307,* which, as is shown by the authorities cited above, is inconsistent with the rule obtaining in our courts.

The fact that the Alien Property Custodian has undertaken to decide that these shares of stock belong to the Leipzig Company is without validity as to Stoehr & Sons, Inc. It was not within his power to render such a decision and to adjudicate upon the rights of this New York corporation. At all events, if the ownership of these shares of stock was vested, either legally or equitably, in Stoehr & Sons, Inc., an adjudication that they were the property of the Leipzig Company, attempted to be made by the Alien Property Custodian under Section 6 of the Trading with the Enemy Act, was *coram non judice.*

The Alien Property Custodian not having the power under the statute to seize property belonging to an American corporation, his acts of seiz-

ing the 14,900 shares and of seeking to sell them are nullities.

Bigelow v. *Forrest, 9 Wall. 339;*
Risley v. *Phoenix National Bank, 83 N. Y. 318.*

For a general statement of the purpose of the Trading with the Enemy Act, see Report of the Committee on Commerce of the Senate, to be found in Senate Documents of the Sixty-fifth Congress, First Session, No. 113; also pamphlet of hearings before the Committee on Interstate and Foreign Commerce of the House of Representatives on H. R. 4704, including the testimony of Mr. Warren, Assistant Attorney General.

VI.

In so far as the Alien Property Custodian undertook as against Stoehr & Sons, Inc., a New York corporation, and, therefore, not an enemy or an ally of an enemy, ex parte and without a legal proceeding based upon notice and a hearing or an opportunity to be heard in court, to take possession of the shares of stock of the Botany Worsted Mills belonging to Stoehr & Sons, Inc., and to determine that such shares belonged to the Leipzig Company or to any other enemy, his action was null and void and in violation of the due process of the Federal Constitution.

This proposition is so clear that it will be sufficient to cite a number of well-known cases in

which the doctrine was carefully elaborated. Two among them arose under the Confiscation Acts of 1861 and 1862. We refer to *McVeigh* v. *United States, 11 Wall. 259*, and *Windsor* v. *McVeigh, 93 U. S. 274*. The opinion of Mr. Justice Field in the latter case has become a legal classic.

To the same effect are the decisions in

Hovey v. *Elliott, 167 U. S. 409;*
Scott v. *McNeal, 154 U. S. 34;*
Central of Georgia Ry. v. *Wright, 207 U. S. 127;*
Londoner v. *Denver, 210 U. S. 385;*
City & County of Denver v. *State Investment Co., 49 Colo. 244, 33 L. R. A., N. S., 395;*
Roller v. *Hall, 176 U. S. 398;*
Coe v. *Armour Fertilizer Works, 237 U. S. 413.*

Chapman v. *Phenix National Bank, 85 N. Y. 437*, is likewise an interesting application of the principle. It also arose under the Confiscation Acts of 1861 and 1862.

In *American Exchange National Bank* v. *Palmer, 256 Fed. Rep. 680*, it was decided that a bill of interpleader might be maintained by an American bank indebted to a depositor who was an American citizen, the Alien Property Custodian having served a notice that the deposit was the property of an alien enemy and requiring payment of the indebtedness to be made to him. In the course of his opinion Judge Mayer recognized the importance of the constitutional safeguards which we are now discussing as applicable to the facts of that case. He said:

"But the reason for concluding that the bank deposit cannot be summarily disposed of goes deeper than a mere collocation of words. Let us start with a case of unliquidated damage. The Custodian in his investigation finds, let us assume, that citizen A, prior to the war, breached his contract for delivery of goods to enemy B. Enemy B had a cause of action against citizen A for damages and would have been entitled to recover. Can it be imagined that Congress, disregarding constitutional safeguards, would have empowered the Custodian to determine without a hearing that citizen A owed enemy B $1,000 because, after investigation, the Custodian regarded that amount as representing the damage to which enemy B would have been entitled as against citizen A? Let us go a step further, and assume that citizen A had made and delivered his note to enemy B, but insisted that there were defenses to the note, and that he did not owe the sum represented by the note, and was not liable upon the note. Could the Custodian determine, without a hearing, that there was liability from citizen A to enemy B upon the note, and therefore that there was either money or property owing from citizen A to enemy B? Wherein does the case at bar differ in principles from these illustrations? As between the Custodian and the bank, the Custodian has assumed to decide the legal liability of the bank; while the amount on deposit is not in dispute, the very vital question as to who the creditor is still remains in controversy. Was it ever intended, in such circumstances, that an *ex parte* investigation of the Custodian could determine, as against a stranger to the investigation, that that stranger owed enemy B instead of citizen A?"

Attention is likewise called to the opinion of Mr. Justice Pitney in *Ochoa* v. *Hernandez, 230 U. S. 139*, where he pertinently said:

> "Without the guaranty of 'due process' the right of private property cannot be said to exist, in the sense in which it is known to our laws. The principle, known to the common law before Magna Charta, was embodied in that charter (Coke, 2 Inst. 45, 50), and has been recognized since the revolution as among the safest foundations of our institutions. Whatever else may be uncertain about the definition of the term 'due process of law,' all authorities agree that it inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure, and without notice or an opportunity for a hearing."

In *Watts* vs. *Unione Austriaica*, 24 U. S. 9, it was held that even alien enemies are entitled to defend before judgment can be entered and that with due regard to the "Trading with the Enemy Act" of October 6, 1917. In that case the Court took notice of the war and reversed the decree of the Court below on the ground that the alien enemy had no opportunity to defend and directed the proceedings to be stayed until the restoration of peace between the United States and Austria-Hungary. The Court cited *McVeigh* vs. *United States*, 11 Wallace (U. S.) 259, and *Windsor* vs. *McVeigh*, 93 U. S. 274; also *Hovey* vs. *Elliott*, 167 U. S. 409.

If judgment cannot be entered even against an alien enemy, without notice and an opportunity to be heard, how much stronger then is the case of one who has been deprived of his property and who is a citizen of the United States, residing therein.

But even though it may be admitted that an enemy in time of war is not entitled to a judicial hearing and determination before his property can be captured and confiscated, a citizen of the United States or an American corporation cannot be deprived of his or its property or of its possession or enjoyment by an executive or administrative order and without the orderly process of the law.

> "To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits. *Rees* vs. *Watertown*, 19 Wall. 107, 123. Nor can extra-official or casual notice, or a hearing granted as a matter of favor or discretion, be deemed a substantial substitute for the due process of law that the Constitution requires. In *Stuart* vs. *Palmer*, 74 N. Y. 183, 188, the Court said: 'It is not enough that the owners may by chance have notice or that they may as a matter of favor have a hearing. The law must require notice to them and give them the right to a hearing and an opportunity to be heard.' It matters not, upon the question of the constitutionality of such a law, that the Assessment has, in fact, been fairly apportioned. The constitutional validity of law is to be tested, not by what has been done under it, but by what may, by its authority be done."
>
> *Coe* vs. *Armour Fertilizer Works*, 237 U. S. 413.

The provision of Section 9 of the Trading with the Enemy Act is not a substitute for the constitutional guaranty of due process of law. It clearly refers to the case of a person not an

enemy or ally of an enemy who claims an interest, right or title in money or other property which has been lawfully seized by the Alien Property Custodian, or to whom a debt may be owing from an enemy or ally of enemy whose property has lawfully come into the possession of the Alien Property Custodian. It certainly was not intended to provide that the property of a citizen may be seized by the Alien Property Custodian, and that if so seized he may be deprived of the attributes of his property, (*People ex rel. Manhattan Savings Institution* v. *Otis, 90 N. Y. 48*), and relegated to a claim against the proceeds in the event, as in the present case, that the Alien Property Custodian should seek to sell that property. Such a seizure would in and of itself be a violation of the Constitution, since captures on land and water must necessarily refer to captures of property belonging to an enemy or the ally of an enemy.

In *American Exchange National Bank* v. *Palmer, supra*, it was contended on behalf of the Alien Property Custodian that the complainant's remedy was under Section 9. Judge Mayer, however, held that that section was not applicable, adding:

> "This section was intended to cover and include property the title to which was in an enemy, and which had been transferred or paid to the Custodian, either voluntarily or following a requirement. It is the citizen's right in enemy's property in the Custodian's hands that is being considered. It is to prevent placing enemy property beyond the reach of American citizens or non-enemies, who may have a right or an interest in or a lien upon the property of an enemy in the Custodian's possession. The section was not

> intended to include non-enemies owning property in the United States in which no enemy had an interest, and which therefore was not required to be reported or transferred to the Custodian. It is difficult to suppose that Congress intended that our citizens should divest themselves of title to their own property, give to it an enemy character, and then get it back under section 9."

There is nothing in the decision in *Miller* v. *United States, 11 Wall. 268,* that contravenes our position. All that was there held was that the enactment of the Confiscation Acts of 1861 and 1862 was a proper exercise of the war powers, and that the right of confiscation of the property of a public enemy exists as fully in the case of a civil war as it does when the war is foreign. The statutes there under consideration, however, expressly provided for notice and a hearing and an orderly proceeding in court before the property of even a public enemy could be condemned. The proceedings were *in rem* instituted in the name of the United States in the United States District Court, such proceedings as the statute required, conforming "as nearly as may be to proceedings in admiralty and revenue cases, and if said property whether real or personal shall be found to have belonged to a person engaged in rebellion, or who has given aid or comfort thereto the same shall be condemned as enemy's property." There was no pretence that the property of a citizen or of a corporation of any of the States not in rebellion, not located within the enemy territory, could be constitutionally seized.

VII.

The contention that any title that might have accrued to the New York Company under the terms of the contract of February 20, 1917, became divested on the passage of the Trading With the Enemy Act, is not tenable. If the interpretation sought to be given to that act by the defendants is correct, then the act, in so far as it undertakes by its fiat to divest such title, constitutes a deprivation of property without due process of law.

Cooley's Constitutional Limitations 444.
Gilman v. *Tucker, 128 N. Y. 190.*
Embury v. *Conner, 3 N. Y. 511.*
Cromwell v. *McLean, 123 N. Y. 474.*
Germania Savings Bk. v. *Suspension Bridge, 159 N. Y. 362.*

VIII.

The sale of the shares of stock belonging to the New York corporation, in the absence of an adjudication in a proceeding duly instituted and conducted in accordance with due process, threatened by the Alien Property Custodian, and the limitation of its eventual relief and remedy upon such sale to the net proceeds received therefrom by the Alien Property Custodian or by the Treasurer of the United States as provided by the Act of November 4, 1918, were likewise violative of due process.

By the Act approved on November 4, 1918, it was provided:

> "The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered or paid over to the alien property custodian, or required so to be, or seized by him shall be that provided by the terms of this *Act, and in the event of sale or other disposition of such property by the alien property custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the alien property custodian or by the Treasurer of the United States.*"

The remedy to which reference is made is claimed by the Government to be that set forth in Section 9 of the Trading with the Enemy Act, which was further amended on July 11, 1919, subsequent to the institution of this action and after this suit was at issue.

The Alien Property Custodian having determined *ex parte* that these shares of stock belong to the Leipzig Company, by similar *ex parte* proceedings determined that they be sold, with the idea of relegating the New York Company to the proceeds of such sale should it eventually establish its ownership of the shares. The effect of such a sale would necessarily be to change the character of the property of the New York Company in the shares. As the owner of the shares it objected to such a sale. It desired to retain its property in its present form, namely, as a controlling interest in a successful industrial corporation, one described by appellees as being unique, the leading manufactory in the industry in which it is engaged within the United States, and possibly in the world. If these shares of stock were sold, as threatened by the Alien Property Custodian, then the nature of the property of the

New York Company in these shares would be completely changed. In lieu of an ownership of shares it would merely be the ownership of the net proceeds, if any, realized on the sale, in excess of the amount to be paid to the Leipzig Company for the shares.

The sale as advertised was to be one in bulk of the majority of the shares in the Botany Worsted Mills. All aliens, including British, Canadian, French, Italian, Spanish, Scandinavian subjects, would, under the terms of the statute and the conditions of the sale, be prohibited from bidding at the sale, as would any American corporation whose stock is alien-owned. From the very nature of things, therefore, competition would be limited. In all probability it would only be the competitors of the Botany Worsted Mills, the principal of whom is the American Woolen Company—colloquially known as the Woolen Trust—that would be likely to bid at such a sale. There would be a certainty that, with this limited competition, the price realized for the shares of stock would be greatly less than their real value.

If, therefore, the New York Company were eventually limited to the recovery of the net proceeds realized upon such a sale in excess of the amount payable to the Leipzig Company, whose equity has been seized by the Alien Property Custodian, it would necessarily follow that the New York Company would be deprived of its property in these shares without due process of law. Its rights reside in the shares. It cannot be compelled to accept a substitute for them, or to speak more accurately, to take the chances of the possible realization of something which may or may not be a substitute therefor. The proceedings sought to be restrained are an attempt to dis-

pose of those shares *in invitum* and to give to the New York Company, in lieu of such ownership, a mere shadow of what before the sale constituted its property right. The latter was substantial. The substitute may prove to be of the most evanescent character.

Had the property seized been real estate located in New York City, and had the Alien Property Custodian attempted to sell it, subject to a mortgage, at a time when real estate values were depressed, and had the owner been ultimately adjudged not to have been an enemy or the ally of an enemy but were nevertheless sought to be relegated "for relief and remedy" solely to the net proceeds of the sale less the amount of the mortgage, could there be any doubt that such a sale would be in violation of the owner's constitutional right of property?

If Section 9 is to be interpreted as authorizing such a sale as that which is now sought to be restrained, where the property belongs to an American corporation, and to limit the owner to such sum as the Alien Property Custodian, who had no right to seize it under the statute or under any rule of law applicable, may realize, then what becomes of due process of law?

The power of Congress conferred by Article I, Section 8, paragraph 11, to make rules concerning captures on land and water, has no relevancy to the capture in the United States of the property of an American corporation domiciled and carrying on its business in the United States. When his property is sought to be taken, even though it be in time of war, such taking must be in conformity with the provisions of the Fifth Amendment to the Constitution. The latter even controls the exercise of the war power.

In *Ex parte Milligan, 4 Wall. 2,* it was held that neither the President nor Congress nor the judiciary can disturb any one of the safeguards of constitutional liberty incorporated into the Constitution, except in so far as the right is given to suspend in certain cases the privilege of the *writ of habeas corpus.*

Ex parte Orozco, 201 Fed. Rep. 109, 117.
Ex parte McDonald, 49 Mont. 467, 471.

That doctrine has never been departed from and is applicable to just such a case as this.

This seizure does not come within the principle of the cases relied on by the defendants, to the effect that where property is taken for a public use it is not necessary to pay for it prior to its seizure so long as provision is made for compensation. It it not pretended that this seizure was for a public use within the constitutional meaning of that term.

But even if it had been, there was no provision in the statute for the just compensation which is required to be paid wherever private property is taken for public use. All that Section 9 purports to do is to permit a claimant who is not an enemy or ally of an enemy, who has an interest in property conveyed, transferred, assigned and delivered to the Alien Property Custodian under the Trading with the Enemy Act, to file his claim with the Alien Property Custodian to the property, if it continues to be in the possession of the Custodian, or to the proceeds of the property if they are paid to the Treasurer of the United States. There is no provision to the effect that, in the event of a sale, the owner of the property is to be paid the difference between the amount realized and the value of the property sold, or

any consequential loss that may have been sustained by reason of such seizure and sale.

On the contrary, as we have seen, the statute expressly negatives such a purpose, for it declares as distinctly as language can, that "the sole relief and remedy of any person having any claim to any * * * property" theretofore or thereafter "conveyed, transferred, assigned, delivered or paid over to the Alien Property Custodian" shall be that provided by section 9. At the risk of repetition we emphasize the concluding words of the amendment of November, 1918, "*and in the event of sale or other disposition of such property by the Alien Property Custodian shall be limited and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States.*"

The law is, therefore, confiscatory in its operation. Consequently the Constitution precludes such a sale as that contemplated and which it is sought by this suit to restrain.

IX.

There having been no adjudication by the President, after investigation, that any of the shares in controversy belong to an enemy or ally of an enemy the act of the Alien Property Custodian, condemning them as enemy-owned, was without jurisdiction and void.

The demands served by the Alien Property Custodian clearly negative Presidential action. No document is presented which assumes to represent

a determination by the President as to the ownership of the shares of stock in question. A. Mitchell Palmer and Francis P. Garvan have made demands which are in effect as follows (*Rec. p. 271 and pp. 256 to 270*):

> "I A. Mitchell Palmer (or Francis P. Garvan), Alien Property Custodian, duly appointed, qualified and acting under the provisions of an Act of Congress known as the 'Trading with the Enemy Act,' approved October 6, 1917, and the amendments thereto and the proclamations and Executive Orders issued in pursuance thereof, by virtue of the authority vested in me by said Act and by said Executive Orders, after investigation do determine that.....whose address is .....is an enemy (not holding a license granted by the President) within the purview of said Act as amended and said proclamations and Executive Orders.
>
> "And as such Alien Property Custodian, after investigation, I do further determine that all those certain rights, privileges and benefits created in favor of and granted to Kammgarnspinnerei Stoehr & Co. Aktiengesellschaft, said enemy) by the terms of that certain contract entered into between said Stoehr & Sons, Inc., and said enemy dated the 20th day of February, 1917, with respect to certain 14,900 shares of the common capital stock of Botany Worsted Mills, a copy of which contract is attached hereto marked Exhibit A belong to or are held by you for, on account of, on behalf of or for the benefit of, said enemy Kammgarnspinnerei Stoehr & Co. Aktiengesellschaft.
>
> "I as such Alien Property Custodian hereby seize every such right * * * and as such Alien Property Custodian, I do hereby require that you shall convey, transfer, assign and deliver to me as Alien Property Custo-

dian, to be by me held, administered and accounted for as provided by law, * * *

Witness my hand and seal of office this day of , 1918.

A. MITCHELL PALMER,
(or FRANCIS P. GARVAN)
Alien Property Custodian."

The authority of the Alien Property Custodian in the premises must be sought in the Trading with the Enemy Act. Most careful examination discloses that there is no provision in that act which empowers the Alien Property Custodian to make a determination as to the character of the property sought to be captured. On the contrary, Section 7, subdivision (c), clearly indicates that it is the President who is to make such investigation and determination. That clause reads:

"(c) If the *President* shall so require, any money or other property owing or belonging to or held for, by, on account of, or for the benefit of an enemy or ally of enemy, not holding a license granted by the President hereunder, *which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered or paid over to the Alien Property Custodian.*"

This subdivision of the act was amended by the act making appropriations to supply deficiencies in appropriations for the fiscal year ending June 20, 1919, approved November 4, 1918. As so amended it reads as follows:

"(c) If the *President* shall so require, any money or other property including (but not thereby limiting the generality of the above) patents * * * and rights and claims of every character and description owing or belonging

to or held for, by, or on account of, or on behalf of or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, *which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered or paid over* to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this act. * * * Whenever any such property shall consist of shares of stock or other beneficial interest in any corporation, association or company or trust it shall be the duty of the corporation, association or company or trustee or trustees issuing such shares or any certificates or other instruments representing the same or any other beneficial interest, to cancel upon its, his, or their books all shares of stock or other beneficial interest standing upon its or his or their books in the name of any person or persons, or held for or on account of, or on behalf of, or for the benefit *of any person or persons who shall have been determined by the President, after investigation*, to be an enemy or ally of enemy, and which shall have been required to be conveyed, transferred, assigned or delivered to the Alien Property Custodian or seized by him, and in lieu thereof to issue certificates or other instruments for such shares or other beneficial interests to the Alien Property Custodian or otherwise, as the Alien Property Custodian shall require."

Section 9 of the Trading with the Enemy Act was amended on July 11, 1919, and as so amended contains the provision:

"Provided, however, that in respect of all property heretofore determined by the *President* to be held, for, by, on account of or on

behalf of, or for the benefit of a person who was an enemy or ally of enemy, if the *President, after further investigation, shall determine that such person was an enemy or ally of enemy* solely by reason of residence in that portion of the territory of any nation associated with the United States in the prosecution of the war which was occupied by the military or naval forces of Germany or Austria-Hungary, or their allies, and that such person is a citizen or subject of such associated nation, then the President, without any application being made therefor, may order the payment, conveyance, transfer, assignment or delivery of such money or other property held by the Alien Property Custodian, or by the Treasurer of the United States, or of the interest therein to which the *President shall determine such person entitled*, either to the said enemy or to the person by whom said property was conveyed, transferred, assigned, delivered or paid over to the Alien Property Custodian."

On October 12, 1917, by Executive Order of the President, it is provided as follows:

"XXIX. I hereby vest in an alien-property custodian, to be hereafter appointed, the executive administration of all the provisions of section 7 (a), section 7 (c), and section seven (d) of the trading with the enemy act, including all power and authority to require lists and reports, and to extend the time for filing the same, conferred upon the President by the provisions of said section 7 (a), *and including the power and authority conferred upon the President by the provisions of said section 7 (c), to require the conveyance*, transfer, assignment, delivery or payment to himself, at such time and in such manner as he shall prescribe, of any money or other properties owing to or

belonging to or held for, by or on account of, or on behalf of, or for the benefit of any enemy or ally of an enemy, not holding a license granted under the provisions of the trading with the enemy act, *which, after investigation, said alien-property custodian shall determine is so owing, or so belongs, or is so held.*"

"XXXIII. The alien property custodian, to be hereafter appointed, is hereby authorized to take all such measures as may be necessary or expedient, and not inconsistent with law, to administer the powers hereby conferred; and he shall have the power and authority to make such rules and regulations not inconsistent with law as may be necessary and proper to carry out the provisions of said section 7 (a), *section 7 (c), section 7 (d), section 8 (a), and section 8 (b), conferred upon the President by the provisions thereof and by the provisions of section 5 (a)*, said rules and regulations to be duly approved by the Attorney General."

In an Executive Order of the President dated February 26, 1918, there are contained the following provisions:

"Any requirement made by the Alien Property Custodian pursuant to Section 7, subsection 'c' of the 'Trading with the Enemy Act' may be known as and called a demand and will be hereafter referred to as a demand."

"The Alien Property Custodian may make demand for the conveyance, transfer, assignment, delivery, and payment of any money or other property owing or belonging to or held for, by, on account of, or on behalf of or for the benefit of an enemy not holding a license granted by me or in the exercise of my power and authority, which the Alien Property Custodian after investigation shall deter-

mine is so owing or so belongs or is so held, together with every right, title, interest, and estate of the enemy in and to such money or other property and every power and authority of the enemy thereover, including (but without limiting the generality of the foregoing—the power and authority to affirm, ratify, approve, revoke, repudiate or disapprove, in whole or in part, and at any time or times, any power, agency, trust or other relation at the time existing * * *."

"The Alien Property Custodian may appoint and clothe with necessary power and authority such agents, bailees, and attorneys in fact as he may find to be necessary or proper to carry out the provisions of the 'Trading with the Enemy Act' and the executive orders, rules and regulations heretofore, hereby, and hereafter made, and prescribe the duties and fix the compensation of such agents, bailees, and attorneys in fact; and any depositary designated by the Alien Property Custodian may be appointed as such agent, bailee or attorney in fact. And the Alien Property Custodian may require bonds of such agents, bailees and attorneys in fact and fix the penalty and conditions thereof."

"The Alien Property Custodian may nominate persons who may, when duly elected or appointed, serve as directors, officers or employees of any corporation whose corporate stock or shares, in whole or in part, are owing or belonging to, or are held for, by, on account of, or on behalf of or for the benefit of an enemy."

It is manifest from the terms of the statute that the action of the President looking to the capture of the enemy-owned property is judicial in its character. The conveyance, transfer, assignment and delivery of such property to the

Alien Property Custodian can only be required in the event that "the President *after investigation shall determine*" that such property belongs to or is held for, by, on account of, or on behalf of, or for the benefit of an alien enemy or ally of enemy. A determination made "after investigation" denotes the exercise of judgment. It is not an arbitrary act, or one which is merely perfunctorily performed. It involves the pronouncement of judgment upon facts, not arbitrarily, but after investigation.

Such being the nature of the duties imposed upon the President, they cannot be delegated. Functions expressly imposed upon him cannot be performed by another. The seizure of property claimed to be enemy-owned must be the act of the President, and not that of any other official.

In this respect the case comes within the principle laid down in *Runkle* v. *United States, 122 U. S. 543.* There it was provided by the Articles of War "for the government of the armies of the United States":

> "Neither shall any sentence of a general court martial, in time of peace, extending to the loss of life, or the dismission of a commissioned officer, or which shall, either in time of peace or war, respect a general officer, be carried into execution until after the whole proceedings shall have been transmitted to the Secretary of War to be laid before the President of the United States, for his confirmation or disapproval, and orders in the case."

It was held that the action required of the President by this article was judicial in its character, and that his approval must be authenticated in a way to show, otherwise than argumentatively,

that it is the result of his own judgment and not a mere departmental order which may or may not have attracted his attention, and that the fact that the order was his own must not be left to inference only. Consequently that, until the President has acted in the manner required by the article, a sentence by a court martial of dismissal of a commissioned officer from the service in time of peace was inoperative. In the course of his opinion Chief Justice Waite said (p. 557):

> "There can be no doubt that the President, in the exercise of his executive power under the Constitution, may act through the head of the appropriate executive department. The heads of departments are his authorized assistants in the performance of his executive duties, and their official acts, promulgated in the regular course of business, are presumptively his acts. * * * Here, however, the action required of the President is judicial in its character, not administrative. As Commander in Chief of the Army he has been made by law the person whose duty it is to review the proceedings of courts martial in cases of this kind. This implies that he is himself to consider the proceedings laid before him and decide personally whether they ought to be carried into effect. Such a power he cannot delegate. His personal judgment is required, as much so as it would have been in passing on the case, if he had been one of the members of the court martial itself. He may call others to his assistance in making his examination and in informing himself as to what ought to be done, but his judgment, when pronounced, must be his own judgment and not that of another. And this because he is the person, and the only person, to whom has been committed the important judicial power of finally determining upon an examination of the whole proceedings of a court

martial, whether an officer holding a commission in the army of the United States shall be dismissed from service as a punishment for an offense with which he has been charged, and for which he has been tried. * * *

Coming then to the order on which reliance is had to show the approval of President Grant, we find it capable of division into two separate parts, one relating to the approval of the proceedings and sentence, and the other to the executive clemency which was invoked and exercised. It is signed by the Secretary of War alone, and the personal action of the President in the matter is nowhere mentioned, except in the remission of a part of the sentence. There is nothing which can have the effect of an affirmative statement that 'the whole proceedings' had been laid before him for action, or that he personally approved the sentence. * * *

Under these circumstances, we cannot say it positively and distinctly appears that the proceedings of the court martial have ever in fact been approved or confirmed in whole or in part by the President of the United States, as the Articles of War required, before the sentence could be carried into execution. * * * Such being our view of the case, it is unnecessary to consider any of the other questions which were referred to the Court of Claims. Neither do we decide what the precise form of an order of the President approving the proceedings and sentence of a court martial should be; nor that his own signature must be affixed thereto. But we are clearly of opinion that it will not be sufficient unless it is authenticated in a way to show otherwise than argumentatively that it is the result of the judgment of the President himself, and that it is not a mere departmental order which might or might not have attracted his personal attention. The fact that the order was his own should not be left to inference only."

In *Truitt* v. *United States*, 38 Ct. Cl. 398, the Court considered an act which provided that the President may assign officers to staff duty "in his discretion." It was held that an order issued by direction of the Secretary of War and by command of Major General Miles was not an order of the President. The Court said:

> "Even if we were to assume that the President could have acted in the premises through General Miles there is nothing in the order or in the record * * * to show that the President directed the issuance of the order. The order on its face purports to have been issued by direction, not of the President, but of the Secretary of War. So there is nothing to show that the President exercised his discretion in the assignment of the claimant to staff duty."

There is nothing in the decision of *Kaku* v. *Garcia*, 263 Fed. Rep. 909, that overcomes the effect of these decisions. If there was such a purpose, it is contrary to the principle laid down in *Runkle* v. *United States*, *supra*. Nor does it give effect to the explicit language of the Trading with the Enemy Act.

That case involved a proceeding against property admittedly belonging to enemies, and not against property belonging to a citizen of the United States residing here and carrying on his business in the State of New Jersey. The proposition that we are now discussing was entirely overlooked. The point raised as to the capture of the property which was the subject-matter of the proceeding was that the demand was not signed by the Alien Property Custodian personally. In answer to that proposition the Court referred to Section 3a of the Executive Order of

February 26, 1918, and called attention to the fact that that section authorized a delegation by the President to the Alien Property Custodian of his own power to delegate. The terms of Section 7c of the Trading with the Enemy Act and the provision relative to the so-called power of the President to act through designated officers were in no way referred to or considered. The opinion of the Court in that case cannot, therefore, be regarded as an adjudication on the proposition now under discussion.

The remark that the duty exercised by the Alien Property Custodian was executive and not judicial, is in direct conflict with what was actually decided in *Runkle* v. *United States, supra.* To say that a *determination* made after investigation is an executive and not a judicial act, is to misconceive the essential elements of the act performed. To make a determination necessarily calls for the exercise of the judicial faculty. To make such a determination after an investigation shows clearly that the act is not ministerial, but judicial. The fact that the act itself constitutes one of sequestration, and may become the basis of actual confiscation, demonstrates that the person performing the function confided in the President by the statute is not acting perfunctorily or as a mere automaton, is not making a determination which is arbitrary, but is in duty bound to render a decision based on reason. If this were not so, then the requirement that there be an investigation and a determination might as well have been eliminated. A demand that the property sought to be captured is enemy-owned might then be made with respect to any and all property within the boundaries of the United States, by whomsoever possessed and by whomsoever actually owned.

The statutory requirement cannot, however, be thus looked upon as naught. It is jurisdictional. Failure to comply with such jurisdictional requirement by the persons named and in the manner specified in the statute constitutes the act an absolute nullity.

That the requirements of the Trading with the Enemy Act are jurisdictional is established by a multitude of decisions, of which *Risley* v. *Phoenix Bank*, 83 N. Y. 318, and *Chapman* v. *Phoenix Bank*, 85 N. Y. 437, are well-known examples. The leading case on the subject, however, is *Thompson* v. *Whitman*, 18 Wall. 457, where it was held that the seizure of a vessel for unlawfully raking clams in violation of the statute, which authorized proceedings for her forfeiture in the county in which seizure was made, was void where it was found that the seizure was not made in the same county although the decree of condemnation recited that it was.

The opinion in *Scott* v. *McNeal*, 154 U. S. 47, collates many other pertinent authorities.

Nor is the case of *Kohn* v. *Joseph and Jacob Kohn, Inc.*, 264 Fed. Rep. 253, in any way applicable to the point now under consideration. The Provisions of the Trading with the Enemy Act now under discussion were in no manner considered; nor was any question raised as to the validity of the demand made. The point solely discussed was what the effect of a demand would be.

It will be claimed that Section 5 of that statute permits the President to delegate his powers under the act. Reference is made to the clause in which it is announced "and he (the President) may make such rules and regulations not inconsistent with law, as may be necessary and proper to carry out the provisions of this act; and the

President may exercise any power conferred by this act *through such officer or officers as he shall direct.*"

It is to be observed that this is not a grant of power to the President to delegate his functions. He is not permitted to abdicate the duties which are expressly imposed upon him. In fact the very clause to which reference is made contemplates that the President is to exercise the power or authority conferred by the act. It is his exercise of power or authority to which reference is made. Upon him rests the responsibility for any action taken. He is merely permitted to call into requisition to enable him to exercise his power and authority such officer or officers as he shall direct. It is he who acts "through such officer or officers." But nevertheless it is he who is to act. In the language of Chief Justice Waite in *Runkle* v. *United States, supra,* he may call others to his assistance in making his examinations and in informing himself as to what ought to be done, but his judgment when pronounced must be his own judgment and not that of another.

It certainly was not intended by Congress that when the President was called upon to determine a fact after investigation, he could direct any other officer of the Government to exercise his powers and to make the adjudication called for by Section 7c. He would not be exercising his power and authority through the Alien Property Custodian if the latter, in an instrument which does not as much refer to the President, declares that he, the Alien Property Custodian, has determined that the property sought to be seized is enemy-owned. That would constitute action by the Alien Property Custodian, but not by the

President. When it is deliberately declared that the President shall perform the important function of making a determination after investigation, it certainly does not carry out the purposes of the legislation if a subordinate official exercises the power. If the Alien Property Custodian may thus assume the Presidential functions, then any clerk in his office might with equal right do so if he performs a service in connection with the investigation which must precede the determination which the statute requires to be made before there can be a seizure of enemy-owned property.

It is also significant that when sub-section (c) of Section 7 was amended on November 4, 1918, more than a year after the enactment of Section 5 of the act, there was not only a re-enactment of that clause of the original act which refers to a determination of the President after investigation, but in the third paragraph of the amendment, which refers specifically to property consisting of shares of stock or other beneficial interest in any corporation held for or on account of or on behalf of or for the benefit of an enemy or ally of enemy, the persons entitled to such stock were expressly referred to as "any person or persons who shall have been determined by the President, after investigation, to be an enemy or ally of enemy, and which shall be required to be conveyed, transferred, assigned or delivered to the Alien Property Custodian or seized by him." This clearly called for Presidential action and not for action by another officer.

That this must have been the intention of Congress is further evident from the fact that the clause just quoted refers to "property required to be conveyed * * * or delivered to the Alien

Property Custodian or seized by him." It would be most extraordinary if the Alien Property Custodian, to whom delivery is to be made or who is to seize the property, should be permitted to make the determination which results in placing into his possession property claimed to be enemy-owned. He would thus be made not only the investigator and the judge, but also the executioner. Such a situation would be contrary to the first elements of propriety and justice.

X.

Independently of the impairment of the constitutional rights of Stoehr & Sons, Inc., the proposed sale would likewise violate the true intent and meaning of the Trading With the Enemy Act.

As his name implies, the Alien Property Custodian is intended to be a mere bailiff. The property seized by him is to be held until the termination of the war. Under Section 12 of the act it is provided:

> *"After the end of the war any claim of any enemy or of any ally of enemy to any money or other property received and held by the Alien Property Custodian or deposited in the United States treasury, shall be settled as Congress shall direct."*

Until Congress shall so direct there can be no confiscation even of the property of an enemy or of an ally of an enemy. Until that time the money or property received by the Alien Property Cus-

todian is to be held by him or deposited in the United States Treasury. *A fortiori* it would be monstrous to believe that the property of one who is neither an enemy nor an ally of an enemy may not only be seized, but may be disposed of and its character changed at the mere will of the Alien Property Custodian.

Section 12 of the Trading with the Enemy Act as passed on October 6, 1917, provided in the fourth paragraph:

> "The alien property custodian shall be vested with all the powers of a common law trustee in respect of all property, other than money, which shall come into his possession in pursuance of the provisions of this Act, and, acting under the supervision and direction of the President, and under such rules and regulations as the President shall prescribe, may manage such property and do any act or things in respect thereof or make any disposition thereof or of any part thereof, by sale or otherwise, and exercise any rights which may be or become appurtenant thereto or to the ownership thereof, if and when necessary to prevent waste and protect such property and to the end that interests of the United States in such property and rights or of such person as may ultimately become entitled thereto, or to the proceeds thereof, may be preserved and safeguarded. It shall be the duty of every corporation in corporated within the United States and every unincorporated association, or company, or trustee, or trustees within the United States issuing shares or certificates representing beneficial interests to transfer such shares or certificates upon its, his, or their books into the name of the alien property custodian upon demand, accompanied by the presentation of the certificates which represent such shares or beneficial interests. The alien

property custodian shall forthwith deposit in the Treasury of the United States, as hereinbefore provided, the proceeds of any such property or rights so sold by them. * * *"

Then follows the clause above quoted as to the ultimate determination by Congress of the claims of an enemy or an ally of an enemy of property seized.

By the amendment of Section 12 contained in the Deficiency Appropriation Act approved March 28, 1918, it was again provided that:

"The alien property custodian shall be vested with all of the powers of a common law trustee in respect of all property, other than money, which has been or shall be, or which has been or shall be required to be, conveyed, transferred, assigned, delivered or paid over to him in pursuance of the provisions of this act, and, in addition thereto, acting under the supervision and direction of the President, and under such rules and regulations as the President shall prescribe, shall have power to manage such property and do any act or things in respect thereof or make any disposition thereof or of any part thereof, by sale or otherwise, and exercise any rights or powers which may be or become appurtenant thereto or to the ownership thereof in like manner as though he were the absolute owner thereof: *Provided, that any property sold under this act, except when sold to the United States, shall be sold only to American citizens, at public sale to the highest bidder, after public advertisement of time and place of sale which shall be where the property or a major portion thereof is situated,* unless the President stating the reasons therefor, in the public interest shall otherwise determine.

"*Provided further,* That when sold at public sale, the alien property custodian upon the

order of the President stating the reasons therefor, shall have the right to reject all bids and resell such property at public sale or otherwise as the President may direct. *Any person purchasing property from the alien property custodian for an undisclosed principal, or for resale to a person not a citizen of the United States, shall be guilty of a misdemeanor,* and, upon conviction, shall be subject to a fine of not more than $10,000, or imprisonment for not more than ten years, or both, and the property shall be forfeited to the United States. It shall be the duty of every corporation incorporated within the United States and every unincorporated association, or company, or trustee, or trustees within the United States issuing shares or certificates representing beneficial interests to transfer such shares or certificates upon its, his, or their books into the name of the alien property custodian upon demand, accompanied by the presentation of the certificates which represent such shares or beneficial interests. The alien property custodian shall forthwith deposit in the Treasury of the United States, as hereinbefore provided, the proceeds of any such property or rights so sold by him."

In *American Exchange National Bank* v. *Palmer, supra,* it was argued on behalf of the Alien Property Custodian, as it has been argued here, that the Trading with the Enemy Act was intended not only to weaken the arm of the enemy by depriving him of resources, but also to strengthen the arm of the captor by furnishing means for the prosecution of the war. Judge Mayer was not impressed by that idea, for he said:

"Nowhere in the act is there evidence of any legislative intent that the purpose of seizing or taking enemy property under the

act is to furnish our government with means to prosecute the war. The final disposition of such property as has been or will be taken under the act will be governed by treaty arrangements or congressional legislation or both. In a broad sense, the United States is a trustee to hold enemy property taken under the act until such time as the United States, in orderly course, shall determine the final disposition thereof. It is fair to assume that any treaty will safeguard the rights of American citizens whose property has been seized in enemy countries, and therefore that the provisions of such treaty will, in this respect, be reciprocal. Undoubtedly resources captured under this act could, as an incident, be used by the United States in the course of its prosecution of the war; but the fundamental purpose of the act was to prevent the enemy from having the advantage of such resources as might be susceptible of capture under the act."

In view of the fact that the Alien Property Custodian is merely vested with the powers of a "common law trustee," it is believed that no substantial change has been wrought by this amendment in the provisions as originally enacted in Section 12 of the Trading with the Enemy Act. The Alien Property Custodian merely receives the property seized for preservation and safeguarding. The power of disposition would necessarily be confined to the sale of perishable property and for the purpose of preventing waste. In view of the fact that the money or property received and held by the Alien Property Custodian is to be subject to the ultimate determination as to its disposition by Congress, it would involve a manifest incongruity if this provision were to be interpreted as giving to the Alien Property

Custodian the right to dispose of any property coming into his possession irrespective of the necessity for such disposition in order to prevent waste and deterioration.

In the present case there is no possible occasion for such sale. The business of the Botany Worsted Mills has been prosperous. It has accumulated a large surplus. The property is in excellent condition. The prospects of a lucrative business are encouraging. Although the war is not literally at an end, it is merely because the United States has not as yet entered into a treaty of peace with Germany, as have the Powers associated with us in the war. The execution of some kind of a treaty may reasonably be expected at an early day. There is therefore no reason for the sale of these shares of stock at this time. Nor have the defendants vouchsafed a reason. To sell this valuable property belonging to an American corporation at this time and under the circumstances disclosed, would be inexcusable.

One who holds property in trust is not vested with arbitrary power. If under the terms of his trust he is permitted to sell the property held in trust, his discretion is not unfettered. He cannot by virtue of that power sell at an unreasonable time, or upon unreasonable conditions, or under circumstances which would result in the sacrifice of the trust property.

That property captured as a prize should be preserved *in specie* until the right to confiscate or requisition it has been judicially determined, was adjudicated in *The Zamora, L. R. 2 App. Cas. (1916) 77.* There a quantity of copper was captured on board of a Swedish steamship and was brought into the Prize Court on the ground that the cargo had an enemy destination or was enemy

property. The ship and cargo were taken into the custody of the marshal pending the proceedings. Under an Order in Council the British Government sought to requisition the cargo upon an undertaking to pay the appraised value into court. It was held that the inherent power of the Prize Court to sell or release property in its custody pending adjudication was confined to cases in which the preservation of the property was impossible or difficult; that under international law a belligerent power can only requisition vessels or goods in the custody of its Prize Court, subject to the limitation (a) that the property is urgently required for use in connection with the defense of the realm, the prosecution of the war, or other matters involving national security; (b) that there was a real question for trial, so that it would be improper to order the release, and (c) that the right to requisition under the particular circumstances is judicially decided by the Prize Court as exercisable.

XI.

The complainant, as a minority stockholder of Stoehr & Sons, Inc., has the right to maintain this action in his representative capacity in view of the fact that the directors of that corporation are the nominees of the Alien Property Custodian, who, by reason of his possession of a majority of the stock, controls the affairs of that corporation.

At the time this action was commenced the directors of that corporation were Mr. Garvan and Mr. Duvall, who were subordinates of Mr.

Palmer, the Alien Property Custodian, and Mr. Kieffer, who was associated with Mr. Quinn, the latter being designated by the Alien Property Custodian as the counsel of Stoehr & Sons, Inc., and of the Botany Worsted Mills. In view of the animosity to the New York Company manifested by Mr. Quinn, in the course of his argument, it is quite evident that an application by the complainant to the Board of Directors of Stoehr & Sons, Inc., named by the Alien Property Custodian, requesting them to bring an action against their creator, would have been a mere farce.

Mr. Wallace, the fourth of these directors, although a prominent banker, owed his office to the sole act of the Alien Property Custodian.

Judge Hand indicated that he had no doubt of the propriety of appellant's procedure.

The fact that the complainant owned 44 shares only of the capital stock of the corporation does not under the authorities affect his right to maintain this action. *Dodge* v. *Woolsey*, 18 How. 331, 2 Machen's Modern Law of Corporations §§1165, 1166.

XII.

The Alien Property Custodian having elected to seize the cause of action of the Leipzig Company against the New York Company for the unpaid purchase price for the 14,900 shares of the Botany Worsted Mills (Defendant's Ex. L-1, Rec. p. 271), he thereby precluded himself because of the election made to seize the 14,900 shares of stock transferred to the New York Company, his election to recognize the transaction as a sale being inconsistent with the position taken by him in the present case.

The appellees are thus seeking to blow hot and cold at the same time. They assert that the New York Company is indebted to the Leipzig Company for the purchase price of a consummated sale, and at the same time claim that there has been no sale. The effect of this dual and inconsistent attitude is to deprive the New York Company of the ability to use the shares of stock for the purpose of financing their payment. In this view the case presents, in most aggravated form, the evils attendant upon the pursuit of inconsistent remedies, and affords impregnable moral support for the application of the doctrine of the election of remedies.

Among the many cases that may be cited under this head we select the following:

Fowler v. *Bowery Savings Bank, 113 N. Y. 450.*
Whalen v. *Stuart, 194 N. Y. 505.*
Moller v. *Tuska, 87 N. Y. 166.*
Bach v. *Tuch, 126 N. Y. 53.*

Morris v. *Rexford, 18 N. Y. 352.*
Acer v. *Hotchkiss, 97 N. Y. 395.*
Conrow v. *Little, 115 N. Y. 387.*
Terry v. *Munger, 121 N. Y. 161.*
Bobbs-Merrill Co. v. *Straus, 210 U. S. 339.*

XIII.

The claim that appellant cannot maintain this suit in his representative capacity because of the provisions of section 9 of the Trading With the Enemy Act or because of alleged noncompliance with the XXVII Equity Rule, proceeds on an erroneous theory.

So far as the Equity Rule is concerned, its requirements have been strictly complied with. It is alleged in the first paragraph of the bill of complaint that Stoehr & Sons, Inc. "is and ever since February 17, 1917, has been a corporation duly organized by and under the Laws of the State of New York." In the third paragraph it is shown that since February 17, 1917, complainant has continuously been and at the time of the commencement of the suit was the lawful owner and holder of record of forty-four shares of the capital stock of Stoehr & Sons, Inc. The grievances which are sought to be redressed occurred subsequent to that date. Hence, in the language of the rule, it is shown "that the plaintiff was a shareholder at the time of the transaction of which he complains."

Within the authorities, including *Hawes* v. *Oakland, 104 U. S. 450*, the fact that the four directors

of Stoehr & Sons, Inc., were the nominees of the Alien Property Custodian, two of them being at the time of their designation his official assistants, and one of them being in the employ of Mr. Quinn, who was designated by the Alien Property Custodian as the attorney for the Botany Worsted Mills and of Stoehr & Sons, Inc., and whose extreme partisanship has been disclosed throughout the trial, rendered it unnecessary to apply to these directors for relief before resort could be taken to the courts. The Alien Property Custodian had seized practically all of the shares of stock of Stoehr & Sons, Inc. He had caused these shares to be transferred into his own name. He therefore controlled the corporation, and the directors held their positions subject to his absolute will.

It is an insult to one's intelligence to intimate that these directors would have listened, even with patience, to a request that they should institute suit against their creator, the Alien Property Custodian, for the purpose of enjoining him from carrying out his order that the 14,900 shares of the Botany Worsted Mills be sold. The law does not require the doing of a vain or useless act. Consequently, in the circumstances disclosed, an application to the board of directors to commence such an action was as unnecessary as would have been a request to the Alien Property Custodian to sue himself.

> *Doctor* v. *Harrington, 196 U. S. 579;*
> *Delaware & Hudson Co.* v. *Albany & S. R. R. Co., 213 U. S. 435.*

As to the claim that Section 9 of the Trading with the Enemy Act precludes the maintenance of such an action as the present, we reply that

it does not even undertake to do so. It does not seek to interfere with the general equity jurisdiction of the courts when invoked by one who has a standing in court. An enemy is prohibited by Section 7, subdivision (b), paragraph 3, from prosecuting any suit or action at law or in equity in any court within the United States prior to the end of the war, except as provided in Section 10, which is not applicable here. There is, however, no such prohibition against a citizen of the United States or a corporation organized under the laws of any of the States.

While Section 9 purports to afford some kind of remedy to a person not an enemy or ally of enemy, as has been herein shown, it is not such a remedy as is adequate under the circumstances. At all events it is not an exclusive remedy, and in so far as the constitutional rights of the complainant and of the New York Company are concerned it cannot be urged as a bar to any resort to the equity powers of this Court.

Moreover, had it even been attempted to deprive the appellant of the right to maintain such an action as the present, for the protection of its constitutional rights, it would have been a nullity.

Ex parte Young, 209 U. S. 123.

XIV.

The contention that the agreement of February 20, 1917, is void and unenforceable because Hans E. Stoehr, who executed it on behalf of the Leipzig Company, was the president of and interested in the New York Company, is not one that lies within the competency of the defendants to make.

Although Hans E. Stoehr acted for the Leipzig Company, of whose supervisory council he was a member, the contract was executed on behalf of the New York Company by George E. Rohlig, Vice-President. But even if Hans E. Stoehr had acted for the latter company and by doing so acted inconsistently with his fiduciary obligation to the Leipzig Company, that fact would merely have made the contract voidable at the latter's election. It did not make the contract a nullity. In the absence of action taken by the Leipzig Company to avoid the agreement, it was in every way effective and binding upon it.

The case principally relied upon by the defendants, *Marsh* v. *Whitmore, 21 Wall. 178,* concedes the correctness of this proposition. Mr. Justice Field said (*p. 183*):

> "Most undoubtedly that sale was voidable. The character of vendor and that of purchaser cannot be held by the same person. * * *"
>
> "And were there nothing more in the case than the fact of the sale and purchase, complainant would be entitled to call the defendant to account for the full value of the bonds. But unfortunately for him there is more in the case. He has adopted and approved of

> the transaction. * * * Had he at once denied the validity of the transaction, or by any declaration or proceeding indicated dissatisfaction with it, or even refrained from expressions of approval, he would have stood in a court of equity in a very different position. * * * At any rate the claim now presented is a stale one. The complainant does not set forth specifically any grounds which could have constituted impediments to an earlier prosecution of his suit."

Because of the complainant's laches equitable relief was denied in the case cited. If the transaction had been absolutely null and void *ab initio* laches would obviously not have debarred complainant's right to relief.

In *3 Pomeroy's Equity Jurisprudence, §§ 1077, 1078,* it is similarly laid down that a contract susceptible to the criticism in which the appellees indulge is voidable and not void.

See also:

> *Twin Lick Oil Co.* v. *Marbury, 91 U. S. 592.*
> *Haywood* v. *Elliott, 96 U. S. 618.*
> *Indianapolis Rolling Mill Co.* v. *St. Louis R. R. Co., 120 U. S. 60.*
> *Hammond* v. *Hopkins, 143 U. S. 250.*
> *Hoyt* v. *Latham, 143 U. S. 566.*

Munson v. *S. G. & C. R. R. Co., 103 N. Y. 58,* likewise relied upon by the appellees, was an action brought by a trustee, who had in his individual capacity entered into a contract for the purchase of property belonging to the *cestui que trust,* for specific performance of the contract, which still remained executory. Doubtless the defendant could avail itself of the right of avoid-

ance. It was in this sense that Judge Andrews referred to the contract as repugnant to the rule "which invalidates all contracts made by a trustee or fiduciary, in which he is personally interested, *at the election of the party he represents.*" It was neither held nor intimated that the contract was void, and therefore a nullity.

In *Continental Securities Co.* v. *Belmont, 206 N. Y. 7,* the suit was not even brought for a rescission of the contract, but merely for an accounting. By that very fact it was recognized that the title to the stock and bonds which were the subject-matter of the litigation had passed. It was merely attempted to require the defendants to account for any benefits received by them or injury done to the corporation by reason of the alleged breach of trust.

The Leipzig Company has not repudiated the instrument. It is our contention that the agreement was entered into with its authority. The Alien Property Custodian, who is a mere custodian or common law trustee of the property seized by him, does not represent the Leipzig Company and cannot, therefore, avoid or annul the transaction evidenced by the agreement. He does not stand in the shoes of the Leipzig Company. He is not its successor. He is dealing merely with a specific item of property the equitable title of which is vested in the New York Company, but which he claims in reality belongs to the Leipzig Company. He cannot by his act in repudiation of the agreement whereby title was vested in the New York Company, divest the latter of such title merely because the Leipzig Company might have taken affirmative steps to nullify the agreement on the theory suggested, assuming the facts to have been as claimed by the defendants.

XV.

The decision of the Court below proceeded on the assumption, that Hans E. Stoehr had a general authority from the Leipzig Company, that would cover the execution by him of a contract for the sale of the shares owned by that company in the Botany Worsted Mills and for the consideration set forth in the contract of February 20, 1917 (Rec., p. 312).

The opinion of Judge Hand shows that, upon the trial, the plaintiff insisted that Hans E. Stoehr was authorized to execute the contract in the name of the Leipzig Company, and prayed that the trial be postponed until it were possible to obtain express evidence of that fact in Germany. The Court reserved decision upon that question until it could learn whether the issue was material to a disposition of the case, meanwhile requiring of the plaintiff to submit by affidavit the particulars of such proof as he could make if permitted *(Rec. p. 310)*. That condition was complied with *(Rec. p. 312)*. Thereupon the Court ruled as indicated. The existence of the authority cannot, under the circumstances, be questioned.

In *Hanger* v. *Abbott, 6 Wall. 532*, Mr. Justice Clifford said:

> "The suspension of the remedy during the war is so absolute that courts of justice will not even grant a motion to take testimony in the enemy's country. *Barrick* v. *Buba, 32 Eng. Law & Eq. 465; Wood* v. *Allen, 2 Dall. 102.*"

That we were at the time of the trial and are still at war with Germany has been adjudged by this Court.

Hamilton v. *Kentucky Distilleries Co.*, *251 U. S. 158-161.*
Jacob Ruppert v. *Caffey, 251 U. S. 291.*

The only method by which the testimony of witnesses residing in Germany could be taken would be by letters rogatory, and such letters could not issue so long as there are no diplomatic relations between the United States and Germany, of which fact the Court took judicial notice.

XVI.

The authority of Hans E. Stoehr to execute on behalf of the Leipzig Company the instrument of February 20, 1917, is shown by the record.

He was a member of the Supervisory Board of the Leipzig Company. He had the confidence of his associates on the board. He held a substantial interest in the corporation. He had been in Germany in the spring of 1914. George Stoehr was in the United States in 1914 and 1915. He was one of the two Managing Directors of the corporation.

The death of Hans E. Stoehr before the commencement of this action has deprived the complainant of the benefit of the testimony that he might have given as to his authoritty. We have, however, the statement made by Heyn & Covington, and approved by Hans E. Stoehr as Treas-

urer of the Botany Worsted Mills and as President of Stoehr & Sons, Inc., in which it is said:

> "H. E. Stoehr represented his father and also Stoehr & Company, the Leipzig Company in this county. Stoehr & Company, the Leipzig corporation, is a German stock company with its plant near Leipzig, Germany. Edward Stoehr occupied a position similar to that of a chairman of the Board of Directors and George Stoehr the position of chief executive officer, similar to president" (*Rec. pp. 221, 223*).

Hans E. Stoehr also held in trust 10,000 shares of the 14,900 shares and Max W. Stoehr the remaining 4,900 shares of that block of the stock of the Botany Worsted Mills of which the Leipzig Company was the equitable owner. Being thus vested with the legal title, it is to be presumed that when they undertook to transfer these shares to the New York Company it was done with the authority of the equitable owner of the shares, and that when Hans E. Stoehr undertook in the name of the Leipzig Company to make such transfer, he had the legal power to do so.

In the absence of statutory provisions requiring it, it is not necessary that the authority of the agent or officer of a corporation shall be in writing.

Central Trust Co. v. *Bridges, 57 Fed. Rep. 753.*

Phelps v. *Sullivan, 140 Mass. 36.*

Farmers Bank v. *Butchers Bank, 16 N. Y. 125.*

Wood v. *Wise, 153 App. Div. 223; aff'd. 208 N. Y. 586.*

A parol appointment has been held sufficient to authorize an agent to assign a patent, a mortgage, a bill of sale of a mining claim, and to subscribe for shares of stock.

McChesney v. *Brown, 29 Fed. Rep. 145.*
Van Nostrand v. *Reed, 1 Wend. 424.*
Moreland v. *Houghton, 94 Mich. 548.*
Dingley v. *McDonald, 124 Cal. 90.*
Patterson v. *Keystone Mining Co., 30 Cal. 360.*
Ingersoll Gravel Road Co. v. *McCarthy, 16 U. C. Q. B. 162.*

Nor is the vote of the board of directors of a corporation necessary to the appointment of an officer or agent or to authorize him to act for the corporation.

United States Bank vs. *Danbridge, 12 Wheat. 64.*
Bank of Metropolis v. *Guttschlick, 14 Pet. 19.*

In *Mining Co.* v. *Anglo-Californian Bank, 104 U. S. 192,* Mr. Justice Harlan said:

> "And it is settled law that the existence of such authority in subordinate officers may, in the absence of express statutory prohibition, be shown otherwise than by the official record of the proceedings of the board. It may be established by proof of the course of business between the parties themselves; by the usage and practice which the company may have permitted to grow up in its business; and by the knowledge which the board, charged with the duty of controlling and conducting the transactions and property of the corporation, had, or must be presumed to

have had, of the acts and doings of its subordinates in and about the affairs of the corporation."

After stating that there was a presumption of authority, the opinion continues:

"That presumption, if not, under the special circumstances of this case, conclusive, might have been overthrown by affirmative proof of want of authority, express or implied, in the president and secretary of the mining company to make overdraft checks, and by proof that the company did not receive the money paid thereon by the bank. There is, however, no such proof in this case. * * * And the finding that 'no resolution or special authority of the defendant was shown authorizing its president and secretary, or either of them, to overdraw its account in bank,' fairly interpreted, means nothing more than that no proof was made, either way, on that point. It does not necessarily imply that resolution to that effect was not, in fact, passed, nor that such special authority was not, in effect, given. The meagre evidence upon which, according to the special finding, the case was tried below, is we think, insufficient to overturn the presumptions which should be indulged in favor as well of the bank as of the integrity and fidelity of the officers of the mining company."

In the important case of *Louisville, New Albany & Chicago Railway Co.* v. *Louisville Trust Co., 174 U. S. 552*, Mr. Justice Gray said:

"A corporation, though legally considered a person, must perform its corporate duties through natural persons, and is impersonated in and represented by its principal officers, the president and directors, who are not merely its agents, but are, generally speaking,

the representatives of the corporation in its dealings with others. Shaw, C. J., in *Burrill v. Nahant Bank, 2 Met. 163, 166, 167*; Comstock, J., in *Hoyt v. Thompson, 19 N. Y. 207, 216.* * * * One who takes from a railroad or business corporation, in good faith, and without actual notice of any inherent defect, a negotiable obligation issued by order of the board of directors, signed by the president and secretary in the name and under the seal of the corporation, and disclosing upon its face no want of authority, has the right to assume its validity, if the corporation could, by any action of its officers or stockholders, or of both, have authorized the execution and issue of the obligation. In *Merchants' Bank v. State Bank, 10 Wall. 604*, this court stated, as an axiomatic principle in the law of corporations, this proposition: 'Where a party deals with a corporation in good faith—the transaction is not *ultra vires*—and he is unaware of any defect of authority or other irregularity on the part of those acting for the corporation, and there is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract, although such defect or irregularity in fact exists. If the contract can be valid under any circumstances, an innocent party in such a case has a right to presume their existence, and the corporation is estopped to deny them.'"

This decision was based on the leading case of *Royal British Bank v. Turquand, 6 El. & Bl. 327.* That was an action upon a bond signed by two directors and given for money borrowed by a joint stock company formed under an act of Parliament limiting its powers to the acts authorized by its deed of settlement. This deed provided that the directors might so borrow such sums as should, by resolution passed at a general meeting of the

company, be authorized to be borrowed. The defense was that no such resolution had been passed and that the bond had been given without the authority of the shareholders.

The Court of Exchequer Chamber, affirming the judgment of the Queen's Bench, held the company liable on the bond, Chief Justice Jervis saying:

> "We may now take for granted that the dealings with these companies are not like dealings with other partnerships, and that the parties dealing with them are bound to read the statute and the deed of settlement. But they are not bound to do more. And the party here, in reading the deed of settlement, would find, not a prohibition from borrowing, but a permission to do so on certain conditions. Finding that the authority might be made complete by a resolution, he would have the right to infer the fact of a resolution authorizing that which on the face of the document appeared to be legitimately done."

The principle laid down in that case has not only been generally accepted in England, as is shown in the opinion of Mr. Justice Gray, but also in our courts.

> *Knox County* v. *Aspinall*, *21 How. 539, 545.*
>
> *Humboldt County* v. *Long*, *92 U. S. 642.*
>
> *Zabriskie* v. *C. C. &c. R. R. Co.*, *23 How. 381.*
>
> *Hackensack Water Co.* v. *DeKay*, *36 N. J. Eq. 548, 559, 567.*

In the case last cited Mr. Justice Depue said:

> "Persons dealing with such companies are, as was said by Lord Hatherly, affected with notice of all that is contained in the statute

and the articles of association; but with regard to all that the directors do with reference to what he calls 'the indoor management of their concern,' that is a thing known to them and to them only, and persons dealing externally with those managing the affairs of the company in a manner which appears to be perfectly consonant with the articles of association, are not to be affected by any irregularities which take place in the internal management of the company. They are entitled to presume that that of which only they can have knowledge, namely, the external acts, is rightly done, when those external acts purport to be performed in the mode in which they ought to be performed. *Mahony* v. *East Holyford Mining Co., L. R. (H. L.) 893, 894.*"

The general principle, that persons acting for corporations are presumed to have authority to do so, is applicable here.

Rockford, &c. R. R. Co. v. *Wilcox, 66 Ill. 417;*
Singer Mfg. Co. v. *Holdfoot, 81 Ill. 455.*

In this case it may well be inquired as to whether the defendant occupies such a status as would enable him to question the applicability of this presumption to the act of Hans E. Stoehr in executing the contract in question.

In *In re New York Economical Printing Co., 110 Fed. Rep. 514*, a question arose between a trustee in bankruptcy and the holder of a chattel mortgage executed by the bankrupt, as to whether the mortgage had been executed by proper authority. Judge Wallace said:

"We have not overlooked the point made by the trustee that the mortgage was invalid because the consents of the stockholders of the

mortgagor had not been filed in the office of the proper official as required by the provisions of the stock corporation law. These provisions are for the protection of stockholders, and only stockholders can take advantage of any defects in complying with them. *Bank* v. *Averell*, *96 N. Y. 467, 475; Paulding* v. *Steel Co., 94 N. Y. 334.*"

To the same effect is the case of *Bishop* v. *Kent & Stanley Co., 20 R. I. 680; 41 Atl. Rep. 255.*
See also

Hervey v. *Railway Co., 28 Fed. Rep. 169;*
Re Romford Canal Co., 24 Ch. Div. 92;
Wood v. *Waterworks Co., 44 Fed. Rep. 159;*
Pittsburgh Ry. Co. v. *Keokuk &c. Bridge Co., 131 U. S. 371;*
Indianapolis Rolling Mill Co. v. *St. Louis &c. Ry. Co., 120 U. S. 256;*
Jones on Real Property, §153;
Beach on Private Corporations, §744.

XVII.

It is respectfully submitted that the judgment of the District Court should be reversed and the prayer of the Bill of Complaint granted.

Louis Marshall,
Louis J. Vorhaus,
Appellant's Counsel.